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NOTES

THE ORIGINALIST'S DILEMMA: KATZ AND THE NEW APPROACH TO THE STATE SOVEREIGN IMMUNITY DEFENSE

*Anthony J. Enright**

INTRODUCTION

Article I, Section 8 of the United States Constitution gives Congress the power "To establish . . . uniform Laws on the subject of Bankruptcies throughout the United States."¹ In exercising this power in the past thirty years, Congress has used language suggesting limitations on the ability of states to raise sovereign immunity as a defense to suits brought under federal bankruptcy laws.

The Bankruptcy Reform Act of 1978² contained a provision indicating that states and the federal government were deemed to have waived sovereign immunity with respect to certain bankruptcy proceedings.³ "[N]otwithstanding any assertion of sovereign immunity," the Act declared states bound by certain court decisions.⁴ In 1989, the Supreme Court held that the language of the Act did not make sufficiently clear congressional intent to abrogate state sovereign immunity.⁵ In response, Congress declared in 1994 that, in no uncertain

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1 U.S. CONST. art. I, § 8, cl. 4.

2 Pub. L. No. 95-598, 92 Stat. 2549.

3 *Id.* § 106 (repealed 1994).

4 *Id.*; see also *Cent. Va. Cmty. Coll. v. Katz*, 126 S. Ct. 990, 995 n.2 (2006).

5 *Hoffman v. Conn. Dep't of Income Maint.*, 492 U.S. 96, 104 (1989). In 1992 the Court held that the Act did not waive the sovereign immunity of the United States. *United States v. Nordic Vill., Inc.*, 503 U.S. 30, 37 (1992).

terms, state "sovereign immunity is abrogated" with respect to sections of the Bankruptcy Code.⁶

Less than two years later, the United States Supreme Court decided *Seminole Tribe v. Florida*,⁷ in which the Court held that notwithstanding its manifest intent to do so, Congress did not have the power to abrogate state sovereign immunity pursuant to the Indian Commerce Clause of Article I, Section 8 of the United States Constitution.⁸

The 5-4 decision in *Seminole Tribe* called the constitutionality of § 106(a) of the United States Bankruptcy Code into serious doubt. Dissenting, Justice Stevens expressly noted that under the Court's holding in *Seminole Tribe*, Congress's amendment to the Bankruptcy Code to make clear its intention to abrogate sovereign immunity "was for naught" because the Constitution denies Congress the power to do so.⁹

The majority of courts of appeals that wrestled with the question agreed with Justice Stevens, who in *Seminole Tribe* saw "no reason to distinguish among statutes enacted pursuant to the power granted to Congress to regulate commerce . . . [and] the power to establish uniform laws on the subject of bankruptcy."¹⁰ Six courts of appeals declared § 106(a) unconstitutional.¹¹ The Court of Appeals for the Sixth Circuit was the exception—twice upholding § 106(a). The Supreme Court granted certiorari on the issue both times.¹² The first time, in 2004, the Supreme Court declined to reach the issue.¹³

6 11 U.S.C. § 106(a) (2000); see also *Katz*, 126 S. Ct. at 995 n.2; S. Elizabeth Gibson, *Congressional Response to Hoffman and Nordic Village: Amended Section 106 and Sovereign Immunity*, 69 AM. BANKR. L.J. 311, 312 (1995) (arguing that in passing the Bankruptcy Reform Act of 1994, Congress was directly responding to the Court's decisions in *Hoffman* and *Nordic Village*).

7 517 U.S. 44 (1996).

8 *Id.* at 47.

9 *Id.* at 90 n.12 (Stevens, J., dissenting).

10 *Id.* at 93–94 (citation omitted).

11 See *Ga. Higher Educ. Assistance Corp. v. Crow* (*In re Crow*), 394 F.3d 918, 922 (11th Cir. 2004); *Nelson v. La Crosse County Dist. Attorney* (*In re Nelson*), 301 F.3d 820, 832 (7th Cir. 2002); *Mitchell v. Franchise Tax Bd.* (*In re Mitchell*), 209 F.3d 1111, 1121 (9th Cir. 2000); *Sacred Heart Hosp. of Norristown v. Pennsylvania* (*In re Sacred Heart Hosp. of Norristown*), 133 F.3d 237, 243 (3d Cir. 1998); *Schlossberg v. Maryland* (*In re Creative Goldsmiths of Wash., D.C., Inc.*), 119 F.3d 1140, 1145–46 (4th Cir. 1997); *Dep't of Transp. & Dev. v. PNL Asset Mgmt. Co.* (*In re Estate of Fernandez*), 123 F.3d 241, 243 (5th Cir.), *amended by* 130 F.3d 1138, 1139 (5th Cir. 1997).

12 *Katz v. Cent. Va. Cmty. Coll.* (*In re Wallace's Bookstore, Inc.*), 106 Fed. App'x. 341 (6th Cir. 2004), *cert. granted*, 125 S. Ct. 1727 (2005), and *aff'd*, 126 S. Ct. 990 (2006); *Hood v. Tenn. Student Assistance Corp.* (*In re Hood*), 319 F.3d 755 (6th Cir.), *cert. granted*, 539 U.S. 986 (2003), and *aff'd on other grounds*, 541 U.S. 440 (2004).

13 *Hood*, 541 U.S. at 443.

The second time, however, in 2006, in *Central Virginia Community College v. Katz*,¹⁴ the Court resolved the nearly thirty-year-old question—in some circumstances, states may not raise a defense of sovereign immunity from suits arising out of laws enacted pursuant to the Bankruptcy Clause of Article I.

In a 5-4 opinion authored by Justice Stevens, the Court explained that Congress, most litigants, and the federal courts had been asking the wrong question. “The relevant question is not whether Congress has ‘abrogated’ States’ immunity,” explained the Court.¹⁵ “The question, rather, is whether Congress’s determination that States should be amenable to such proceedings is within the scope of its power to enact ‘Laws on the subject of Bankruptcies.’”¹⁶ The Court answered this question in the affirmative: “Insofar as orders ancillary to the bankruptcy courts’ *in rem* jurisdiction . . . implicate States’ sovereign immunity from suit, the States agreed in the plan of the Convention not to assert that immunity.”¹⁷ Because the relevant “abrogation” occurred in the Constitution itself, the enactment of § 106(a) “was not necessary to authorize the Bankruptcy Court’s jurisdiction” over claims against unconsenting states.¹⁸

Katz is remarkable not merely for its outcome, but also because of the different approaches reflected in the majority and dissenting opinions. Although much of the Court’s sovereign immunity jurisprudence has been characterized by sharply divided, 5-4 opinions, all of the Justices have recognized history as playing an important role in determining what the law is today.¹⁹ *Katz* goes a step further with respect to its use of history. Although it is also a 5-4 decision, the central inquiry for both the majority and the dissent in *Katz* is an originalist one: How was Congress’s Article I bankruptcy power understood by the Constitution’s Framers?²⁰

14 126 S. Ct. 990.

15 *Id.* at 1005.

16 *Id.* (quoting U.S. CONST. art. I, § 8, cl. 4).

17 *Id.* at 1002.

18 *Id.* at 995.

19 See Anthony J. Bellia Jr., *Congressional Power and State Court Jurisdiction*, 94 GEO. L.J. 949, 952 & n.16 (2006).

20 See *Katz*, 126 S. Ct. at 996 (“The history of the Bankruptcy Clause, the reasons it was inserted in the Constitution, and the legislation both proposed and enacted under its auspices immediately following ratification of the Constitution demonstrate that it was intended not just as a grant of legislative authority to Congress, but also to authorize limited subordination of State sovereign immunity in the bankruptcy area.”); *id.* at 1006–07 (Thomas, J., dissenting) (arguing that the majority’s conclusion “cannot be justified by the text, structure or history of our Constitution,” and that

At the center of the Court's opinion is an important piece of historical evidence. Congress, just two years after the Eleventh Amendment was ratified, exercised its Article I bankruptcy power for the first time, and passed a law that interfered with state sovereign immunity.²¹ Under the Court's pre-*Katz* sovereign immunity jurisprudence and the approach articulated by the dissenting Justices in *Katz*, this early law would appear to be unconstitutional.

What divides the majority and the dissent is more than a difference of opinion over the proper inferences to draw from historical evidence. In this Note I attempt to demonstrate that while the *Katz* majority's originalism is more faithful to the original meaning of the Bankruptcy Clause when the Clause is viewed in isolation, the dissent's approach, consistent with the Court's pre-*Katz* jurisprudence, reflects an effort to move closer to the original understanding of the Constitution as a whole. The incongruence between the historical understanding of the Bankruptcy Clause articulated by the majority and the modern understanding articulated by the dissent reveals that the Court's recent state sovereign immunity cases reflect a jurisprudential shift occasioned by the Court's expansion of the congressional commerce power. To the extent that passage of the first Bankruptcy Act is evidence of the Constitution's original meaning, it suggests that the Court's recent approach to federalism is a modern surrogate for the constitutional protection originally (but no longer) afforded by the text of the Tenth Amendment coupled with the limited textual reach of Article I.

The discussion proceeds in four parts. Part I describes Congress's early use of the Article I bankruptcy power. It explains why the first Bankruptcy Act would not have been considered a constitutionally proper exercise of Congress's bankruptcy power under the Court's recent pre-*Katz* state sovereign immunity cases. The discussion in Part I details why this is true even though the *Katz* majority is correct that members of the Founding era probably believed the law was constitutionally sound.

Part II describes how the modern Supreme Court's expansive Commerce Clause jurisprudence renders illusory the means by which the text of the Constitution originally protected state autonomy. Part III argues that the Court's contemporary sovereign immunity jurisprudence functions as a surrogate for the original constitutional means of

historical evidence reveals no "intention to abrogate State sovereign immunity through the Bankruptcy Clause").

21 *Id.* at 1002 (majority opinion) (citing CHARLES WARREN, *BANKRUPTCY IN UNITED STATES HISTORY* 10 (1935)).

protecting federalism, and gives life to the original constitutional command of state autonomy. Part IV describes the extent of the *Katz* exception to the presumption that states enjoy sovereign immunity not subject to congressional abrogation.

I. CONGRESS'S EARLIEST USE OF ITS ARTICLE I BANKRUPTCY POWER
WOULD NOT HAVE COMPORTED WITH THE MODERN
SUPREME COURT'S PRE-KATZ SOVEREIGN
IMMUNITY JURISPRUDENCE

The respondents in *Katz* had to overcome statements in recent Supreme Court sovereign immunity cases that many believed had settled the issue.²² When the Court held in *Seminole Tribe* that Congress did not have the constitutional power to abrogate state sovereign immunity pursuant to the Indian Commerce Clause of Article I, the Court explained that “[t]he Eleventh Amendment restricts the judicial power under Article III, and Article I cannot be used to circumvent the constitutional limitations placed upon federal jurisdiction.”²³

The Court itself has read *Seminole Tribe*, the holding of which was predicated on a recognition that states enjoyed sovereign immunity absent congressional action, as making “clear that Congress may not abrogate State sovereign immunity pursuant to its Article I powers.”²⁴ Because Congress’s power “To establish . . . uniform Laws on the subject of Bankruptcies throughout the United States”²⁵ is an Article I power, it would seem that Congress could not use it to declare that with respect to the United States Bankruptcy Code “sovereign immunity is abrogated.”²⁶

The *Katz* Court itself recognized that its holding reflected a change in course from at least the language of its prior sovereign immunity cases. The Court expressly “acknowledge[d] that statements

22 See, e.g., cases cited *supra* note 11 (holding § 106(a) of the Bankruptcy Code unconstitutional in light of recent Supreme Court cases).

23 *Seminole Tribe v. Florida*, 517 U.S. 44, 72–73 (1996).

24 *Fla. Prepaid Postsecondary Educ. Expense Bd. v. Coll. Sav. Bank*, 527 U.S. 627, 636 (1999).

25 U.S. CONST. art. I, § 8, cl. 4.

26 11 U.S.C. § 106(a) (2000). Several Justices had reached this issue in earlier, nonmajority opinions and found § 106(a) to be invalid. See *Tenn. Student Assistance Corp. v. Hood*, 541 U.S. 440, 456 (2004) (Thomas, J., dissenting, joined by Scalia, J.) (“Congress lacks authority to abrogate State sovereign immunity under the Bankruptcy Clause.”); *Hoffman v. Conn. Dep’t of Income Maint.*, 492 U.S. 96, 105 (1989) (O’Connor, J., concurring) (“Congress may not abrogate the States’ Eleventh Amendment immunity by enacting a statute under the Bankruptcy Clause”); *id.* at 105 (Scalia, J., concurring in the judgment) (finding that Congress had “no power to” subject states to suit pursuant to the Bankruptcy Clause).

in both the majority and the dissenting opinions in *Seminole Tribe*, reflected an assumption that the holding in that case would apply to the Bankruptcy Clause.²⁷ The Court concluded that this “assumption was erroneous,” and that it was not bound to follow the language of *Seminole Tribe* because, as applied to the Bankruptcy Clause, it was dicta.²⁸

If the Court followed the language of *Seminole Tribe* and its other recent sovereign immunity cases, the Bankruptcy Clause, as an Article I power, would afford Congress no power to subject states to private suits without their consent. Under this approach, part of the Bankruptcy Act of 1800²⁹ would have been unconstitutional.

A. *The Bankruptcy Act of 1800 Provided for a Discharge from State Debtors’ Prison on a Federal Writ of Habeas Corpus*

With respect to federalism questions, and particularly those concerning sovereign immunity, the Supreme Court has looked with a keen eye to “early congressional practice, which provides ‘contemporaneous and weighty evidence of the Constitution’s meaning.’”³⁰ In *Katz*, this view brought into play Congress’s first effort at a national Bankruptcy Act.

In 1800 the Sixth Congress passed the first Federal Bankruptcy Act.³¹ The Act was largely a copy of the Bankruptcy Act then in place in England, with one significant difference.³² The American Act included a unique provision that authorized a discharge of a debtor, imprisoned in state debtor’s prison, on a federal writ of habeas corpus. The law specifically provided:

That if any bankrupt, who shall have obtained his certificate, shall be taken in execution or detained in prison, on account of any debts owing before he became a bankrupt, by reason that judgment was obtained before such certificate was allowed, it shall be lawful for any of the judges of the court wherein judgment was so obtained, or for any court, judge, or justice, within the district in which such bankrupt shall be detained, having powers to award or

27 Cent. Va. Cmty. Coll. v. Katz, 126 S. Ct. 990, 996 (2006) (citation omitted).

28 *Id.*

29 Act of Apr. 4, 1800, ch. 19, 2 Stat. 19 (repealed 1803).

30 Alden v. Maine, 527 U.S. 706, 743–44 (1999) (quoting Printz v. United States, 521 U.S. 898, 905 (1997)).

31 Ch. 19, 2 Stat. 19. “This first Bankrupt Act of 1800 was by its terms limited to a five years’ operation, but it only lasted three years.” CHARLES WARREN, BANKRUPTCY IN UNITED STATES HISTORY 19 (1935). It was repealed in 1803. *Id.*

32 Randolph J. Haines, *The Uniformity Power: Why Bankruptcy Is Different*, 77 AM. BANKR. L.J. 129, 178 (2003).

allow the writ of habeas corpus, on such bankrupt producing his certificate so as aforesaid allowed, to order any sheriff or gaoler who shall have such bankrupt in custody, to discharge such bankrupt without fee or charge³³

By its terms, the provision authorized a federal court to issue an order against a state official, in his official capacity, requiring the release of a state prisoner. A judicial action against a state official is generally understood to be an action against the state itself,³⁴ and under *Seminole Tribe*, Article I does not give Congress the power to abrogate state sovereign immunity.³⁵ Under modern Supreme Court jurisprudence, this provision would appear to be unconstitutional in the absence of an exception to these general rules.

B. Pre-Katz Sovereign Immunity Jurisprudence Provided No Exception to the General Prohibition Against Congressional Interference with State Sovereign Immunity that Would Authorize the Bankruptcy Act of 1800

There are three potential exceptions to the *Seminole Tribe* principle that, if applicable, would authorize the habeas corpus provision of the first Bankruptcy Act. The first exception applies where a suit involves a claim against a state official for prospective, injunctive relief in order to stop an ongoing violation of the Constitution or federal

33 § 38, 2 Stat. at 32. This habeas corpus provision was the only one of its kind in American law. Although the Judiciary Act of 1789, ch. 20, § 14, 1 Stat. 73, 81–82, provided for a writ of habeas corpus that could operate to release federal prisoners, it did not provide the same for state prisoners. See *Ex parte Dorr*, 44 U.S. (3 How.) 103, 105 (1845); *Ex parte Bollman*, 8 U.S. (4 Cranch) 75, 97–98 (1807). The first provision granting a federal writ of habeas corpus to a state prisoner “restrained of his or her liberty in violation of the constitution, or of any treaty or law of the United States” was not passed until 1867. See Act of Feb. 5, 1867, ch. 28, § 1, 14 Stat. 385, 385. Prior to the Civil War the only other provisions permitting release from state prison on a federal writ applied to those imprisoned for acts committed on the authority of a foreign power, or of the United States, respectively. See Act of Aug. 29, 1842, ch. 257, § 1, 5 Stat. 539, 539 (permitting release from state prison on a federal writ for subjects of foreign states imprisoned for acts “done or omitted under any alleged right, title, authority, privilege, protection, or exemption, set up or claimed under the commission, or order, or sanction, of any foreign State or Sovereignty, the validity and effect whereof depend upon the law of nations or under color thereof”); Act of Mar. 2, 1833, ch. 57, § 7, 4 Stat. 632, 634–35 (permitting release from state prison on a federal writ for those imprisoned for acts taken “in pursuance of a Law of the United States”).

34 *Governor v. Madrazo*, 26 U.S. (1 Pet.) 110, 123–24 (1828) (Marshall, C.J.).

35 *Seminole Tribe v. Florida*, 517 U.S. 44, 47 (1996); see also *Fla. Prepaid Post-secondary Educ. Expense Bd. v. Coll. Sav. Bank*, 527 U.S. 627, 636 (1999) (“Congress may not abrogate state sovereign immunity pursuant to its Article I powers . . .”).

law.³⁶ Another potential exception involves the writ of habeas corpus. This exception is predicated on the theory that the federal power to issue writs of habeas corpus is not barred by the sovereign immunity of states. In his *Katz* dissent, Justice Thomas relies on this theory to argue that the Bankruptcy Act of 1800 would not have offended the Framers' view of sovereign immunity.³⁷ A third potential exception relies on the claim that "bankruptcy is different"; that is, the Bankruptcy Clause of Article I grants to Congress a power to invade state sovereign immunity that other Article I clauses do not grant.³⁸ It is this third exception that the majority recognizes in reaching its holding in *Katz*.³⁹

Each of these potential exceptions is addressed in turn. Because each is either inapplicable or inconsistent with the Court's pre-*Katz* jurisprudence, none of the three satisfactorily reconciles the first Bankruptcy Act with the Court's modern approach toward questions of state sovereign immunity.

1. *Ex Parte Young* Provides No Exception that Would Authorize the Bankruptcy Act of 1800 Because the Provision Does Not Require Any Unlawful Conduct on the Part of the State Official that Would Strip Him of His Official Character

The habeas corpus provision of the Bankruptcy Act of 1800 was unique not only because of its applicability to state prisoners,⁴⁰ but also because its application does not presuppose a violation of law on the part of the state official against whom the federal courts were empowered to grant relief.

A claim against a state official in his official capacity or "by his title" is generally understood as a claim against the state itself⁴¹ and thus implicates state sovereign immunity. As the Court explained in

36 See *Seminole Tribe*, 517 U.S. at 73.

37 Cent. Va. Cmty. Coll. v. *Katz*, 126 S. Ct. 990, 1011 n.6 (2006) (Thomas, J., dissenting) ("[H]abeas relief simply does not offend the Framers' view of state sovereign immunity.").

38 For a persuasive academic exposition of the bankruptcy exceptionalism argument, see Haines, *supra* note 32.

39 See *Katz*, 126 S. Ct. at 1004–05 ("States agreed in the plan of the Convention not to assert any sovereign immunity defense they might have had in proceedings brought pursuant to 'Laws on the subject of Bankruptcies'. . . . The scope of this consent was limited . . .").

40 See *supra* note 33.

41 *Governor v. Madrazo*, 26 U.S. (1 Pet.) 110, 123–24 (1828) (Marshall, C.J.).

Seminole Tribe, a “narrow exception” exists to this rule.⁴² The jurisdictional bar blocking suits against states and their officials is sometimes lifted pursuant to the doctrine of *Ex parte Young*.⁴³ *Ex Parte Young* is credited with establishing what is commonly referred to as the “stripping doctrine”; the postulate that a state official is stripped of his official character when acting in violation of the Constitution or federal law. Under such a circumstance the official’s action

is simply an illegal act upon the part of a State official in attempting by the use of the name of the State to enforce a legislative enactment which is void because unconstitutional The State has no power to impart to him any immunity from responsibility to the supreme authority of the United States.⁴⁴

The Court’s contemporary exposition of the “stripping doctrine” allows federal courts to “lift” the sovereign immunity “bar” when (1) the claim is “against a State official,” (2) the claim “seeks only prospective injunctive relief,” and (3) the relief is sought to “end a continuing violation of federal law.”⁴⁵ The habeas corpus provision of the first Bankruptcy Act is consonant with the first two elements. The Act refers to the “sheriff or gaoler,”⁴⁶ in whose custody the bankrupt resides, by title, and can thus fairly be read to authorize an order against a state official.⁴⁷ The only remedy that the provision authorizes is pro-

42 *Seminole Tribe v. Florida*, 517 U.S. 44, 76 (1996).

43 209 U.S. 123 (1908); *see also Seminole Tribe*, 517 U.S. at 73.

44 *Young*, 209 U.S. at 159–60.

45 *Seminole Tribe*, 517 U.S. at 73 (citing *Green v. Mansour*, 474 U.S. 64, 68 (1986)). The Court also recognizes that Congress may confine the action to a statutory remedial scheme, the existence of which precludes a federal court from permitting an action against a state officer based on *Ex parte Young*. *Id.* at 74. The remedial scheme itself, however, cannot make lawful an otherwise impermissible invasion of state sovereign immunity, at least where passed pursuant to Congress’s commerce powers. *See id.* at 72.

46 Act of Apr. 4, 1800, ch. 19, § 38, 2 Stat. 19, 32 (repealed 1803).

47 To the extent that the Act reaches *local* sheriffs or gaolers, in connection with their enforcement of state bankruptcy law, they would probably be subject to the state sovereign immunity defense to the same extent as state officials. Although local officials are not generally shielded from suits by state sovereign immunity, *see Mt. Healthy City Sch. Dist. Bd. of Educ. v. Doyle*, 429 U.S. 274, 572 (1977), the Court has held that a state’s sovereign immunity extends to local governments and their officials when there is so much state involvement in the locality’s actions that the relief effectively runs against the state. *See Pennhurst State Sch. & Hosp. v. Halderman* 465 U.S. 89, 124 (1984). Furthermore, the Court has recognized county sheriffs as state officials when sued in connection with duties that put them in the position of representing the state. *McMillan v. Monroe County*, 520 U.S. 781, 793 (1997).

spective injunctive relief, specifically, "discharge . . . without fee or charge."⁴⁸

The provision ceases to be consistent with established sovereign immunity jurisprudence with respect to the third element, the sine qua non of the "narrow exception"⁴⁹ of *Ex parte Young*—unlawfulness on the part of the state official.

Debtors discharged from debts pursuant to the Bankruptcy Act of 1800 were issued a certificate of discharge by a federal court.⁵⁰ If arrested for a discharged debt after receiving the certificate, the debtor was afforded an appearance at which he could present his certificate.⁵¹ The certificate would serve as prima facie evidence of the debtor's discharge that required a verdict in his favor, unless the plaintiff could prove that the certificate was defective because of fraud or similar impropriety.⁵²

While a failure to recognize a valid discharge certificate could potentially result in confinement in violation of federal law, the Bankruptcy Act expressly recognized that some debtors would be lawfully imprisoned under state authority for debts before they obtained a federal certificate. For such persons, the Act provided a different process—the habeas corpus discharge. By its terms, the habeas provision extends to those "detained in prison, on account of any debts owing before he became a bankrupt, by reason that judgment was obtained before" the debtor obtained a certificate of discharge from the bankruptcy commissioner.⁵³

The provision which made presentment of a valid certificate an affirmative defense would preclude the state from rearresting and lawfully confining a discharged debtor. However, nothing in the first Bankruptcy Act prohibited states from lawfully detaining debtors who had not yet obtained a valid federal discharge. And nothing in the Act rendered the confinement of such debtors who had subsequently obtained certificates unlawful *prior* to the point of release on habeas corpus. The habeas corpus release is not a remedy against states that violate the Bankruptcy Act by holding discharged prisoners;⁵⁴ habeas

48 § 36, 2 Stat. at 32.

49 *Seminole Tribe*, 517 U.S. at 76.

50 § 36, 2 Stat. at 31.

51 *Id.* § 34.

52 *Id.*

53 *Id.* § 38.

54 The statute expressly authorizes the judges of the court that ordered the debtor's confinement to issue writs of habeas corpus. *Id.* This strongly suggests that following the mechanism that the statute sets forth for discharge and release of prisoners constitutes conformity with, rather than derogation from, federal law.

corpus is the sole mechanism that the Act provides for release of such prisoners. The Act expressly contemplates that discharged debtors will remain confined until released on writs of habeas corpus.⁵⁵

Because the provision expressly applies to those who were lawfully imprisoned by states before any federal proceedings began, and because the Bankruptcy Act does not render such confinement unlawful, the provision does not involve the kind of illegality on the part of the state official required for application of the *Ex parte Young* "stripping doctrine."⁵⁶

2. The Federal Power To Issue Writs of Habeas Corpus Carries with It No Exception to State Sovereign Immunity that Would Authorize the Bankruptcy Act of 1800.

A close parallel to the *Ex parte Young* exception in state sovereign immunity jurisprudence is the well established power that federal courts currently have to issue writs of habeas corpus to state prisoners held "in custody in violation of the Constitution or laws or treaties of the United States."⁵⁷ While habeas corpus does include an exception to state sovereign immunity that permits federal courts to act on state officials who confine prisoners unlawfully, the exception, like that of *Ex parte Young*, does not extend to circumstances where the confinement is not alleged to be unlawful.

The Constitution provides that "The Privilege of the Writ of Habeas Corpus shall not be suspended, unless when in Cases of Rebellion or Invasion the public Safety may require it."⁵⁸ Although the precise meaning of the Suspension Clause has been controversial,⁵⁹ its

55 While the Bankruptcy Act probably did nothing to *prohibit* state law from ordering a debtor's release forthwith upon receipt of a federal certificate, it expressly endorses habeas corpus as the means by which imprisoned debtors would be heard and released. *Id.* It would be an unreasonable stretch to read into the Act a *requirement* that states do so, such that they act unlawfully when they fail to provide a different means for administering the release of certified prisoners.

56 The Court in *Katz* finds that *Ex parte Young* does not provide an exception to sovereign immunity that would have been understood by the Framers to have authorized the first Bankruptcy Act because "[t]he *Ex parte Young* doctrine was not finally settled until over a century after the Framing and the enactment of the first bankruptcy statute." *Cent. Va. Cmty. Coll. v. Katz*, 126 S. Ct. 990, 1005 n.14 (2006). As discussed, however, the first Bankruptcy Act would not be consistent with *Ex parte Young* even today, as its habeas corpus discharge was not predicated upon unlawful confinement.

57 28 U.S.C. § 2254(a) (2000).

58 U.S. CONST. art. 1, § 9, cl. 2.

59 See WILLIAM F. DUKER, A CONSTITUTIONAL HISTORY OF HABEAS CORPUS 126 (1980).

terms contemplate that the federal government would have some role, or be subject to some limitations, with respect to habeas corpus pursuant to what Hamilton called "the plan of the convention."⁶⁰ That role would be defined largely by Congress. As the Supreme Court explained at an early date, "the power to award the writ by any of the courts of the United States[] must be given by written law."⁶¹

For much of our history, Congress largely refrained from giving federal courts the power to issue writs of habeas corpus that could effect a release of state prisoners.⁶² Other than in the Bankruptcy Act of 1800, Congress did so only twice prior to the Civil War, in limited circumstances where the prisoner could claim a privilege under federal law or under the law of nations, respectively.⁶³

The form of federal-state⁶⁴ habeas corpus that is today most common originated with the Habeas Corpus Act of 1867,⁶⁵ which empowered federal courts and judges to issue writs of habeas corpus "in all cases where any person may be restrained of his or her liberty in violation of the constitution, or of any treaty or law of the United States."⁶⁶ The Act authorized federal courts and judges to issue orders effective against "the person in whose custody the party is detained."⁶⁷ Because the Act authorized federal judicial action against a state official that

60 THE FEDERALIST NO. 81, at 422 (Alexander Hamilton) (George W. Carey & James McClellan eds., 2001).

61 *Ex parte Bollman*, 8 U.S. (4 Cranch) 75, 94 (1807) (Marshall, C.J.).

62 Until the mid-nineteenth century, many courts and commentators recognized the power of *state* courts to issue writs of habeas corpus to inquire into the legality of *federal* imprisonment. See DUKER, *supra* note 59, at 149. The Supreme Court eventually held, however, that state courts are without authority to issue the writ to question the custody of federal prisoners. See *Tarble's Case*, 80 U.S. (13 Wall.) 397, 409–10 (1871); *Ableman v. Booth*, 62 U.S. (21 How.) 506, 514–16 (1858).

63 See Act of Aug. 29, 1842, ch. 257, § 1, 5 Stat. 539, 539 (permitting release from state prison on a federal writ for subjects of foreign states imprisoned for acts "done or omitted under any alleged right, title, authority, privilege, protection, or exemption, set up or claimed under the commission, or order, or sanction, of any foreign State or Sovereignty, the validity and effect whereof depend upon the law of nations or under color thereof"); Act of Mar. 2, 1833, ch. 57, § 7, 4 Stat. 632, 634 (permitting release from state prison on a federal writ for those imprisoned for acts taken "in pursuance of a Law of the United States").

64 By this, I mean a federal writ of habeas corpus that operates to release state prisoners.

65 Ch. 28, 14 Stat. 385.

66 *Id.* § 1.

67 *Id.*

would direct him to act in his official capacity, the Act appears on its face to implicate state sovereign immunity.⁶⁸

Yet shortly after its enactment, the Supreme Court recognized the validity of this provision in *Ex parte Royall*,⁶⁹ and has upheld its application many times since.⁷⁰ The jurisdictional basis for federal-state habeas corpus remains virtually the same today as it was in 1867.⁷¹ That state sovereign immunity poses no bar to the current regime of federal-state habeas corpus is today taken for granted. The relationship between the two doctrines has gone virtually unmentioned in recent years, even in leading works that focus on either or both subjects.⁷²

While the constitutionality of the federal habeas corpus statute may today be beyond question, the basis for distinguishing the current federal-state habeas corpus regime from other forms of congressionally authorized suits against states is important in light of the limits that the Constitution is understood to place on congressional abrogation of state sovereign immunity. The constitutionality of modern federal-state habeas corpus, like the doctrine of *Ex parte Young*, depends on an allegation of unlawfulness on the part of the state official. The plaintiff seeking habeas relief must be “in custody *in violation of* the Constitution or laws or treaties of the United States.”⁷³

68 See *Governor v. Madrazo*, 26 U.S. (1 Pet.) 110, 123–24 (1828) (Marshall, C.J.) (recognizing that a suit naming a state official “by title” is a suit against the state).

69 117 U.S. 241, 249 (1886) (Harlan, J.) (“[N]o doubt can exist as to the power of Congress thus to enlarge the jurisdiction of the courts of the Union That the petitioner is held under the authority of a State cannot affect the question of the power or jurisdiction of the Circuit Court to inquire into the cause of his commitment, and to discharge him if he be restrained of his liberty in violation of the Constitution.”).

70 See *United States ex rel. Elliott v. Hendricks*, 213 F.2d 922, 927–28 (3d Cir. 1954) (collecting Supreme Court cases in which federal-state habeas corpus was exercised “without the slightest suggestion that either it or the inferior federal courts were acting beyond their constitutional power”).

71 Congress has imposed some restrictions on the scope of inquiry in which courts may engage when issuing the writ, see, e.g., Antiterrorism and Effective Death Penalty Act of 1996, Pub. L. No. 104-132, 110 Stat. 1214, but habeas corpus remains available to those held “in custody in violation of the Constitution or laws or treaties of the United States,” 28 U.S.C. § 2254 (2000).

72 See, e.g., ERWIN CHERMERINSKY, CONSTITUTIONAL LAW §§ 3.3.3–3.3.5 (2d ed. 2002) [hereinafter CHERMERINSKY, CONSTITUTIONAL LAW]; ERWIN CHERMERINSKY, FEDERAL JURISDICTION (4th ed. 2003); DUKER, *supra* note 59; ERIC M. FREEDMAN, HABEAS CORPUS: RETHINKING THE GREAT WRIT OF LIBERTY (2001); RANDY HERTZ & JAMES S. LIEBMAN, FEDERAL HABEAS CORPUS PRACTICE AND PROCEDURE (4th ed. 2001); KATHLEEN M. SULLIVAN & GERALD GUNTHER, CONSTITUTIONAL LAW (15th ed. 2004).

73 28 U.S.C. § 2254 (emphasis added).

It is the predicate unlawfulness that allowed the Supreme Court to uphold the habeas corpus act in *Royall*. As *Royall*'s author, Justice Harlan, later explained in dissent in *Ex parte Young*, the only object of a habeas corpus proceeding is "to inquire whether the applicant for the writ is illegally restrained of his liberty. If he is, then the state officer holding him in custody is a trespasser, and cannot defend the wrong or tort committed by him, by pleading his official character."⁷⁴ It is only because the state official is proceeding as a trespasser in violation of the Constitution or laws of the United States that a habeas corpus action "is not a suit against a State within the meaning of the Eleventh Amendment, but a suit against the trespasser or wrongdoer."⁷⁵ Justice Harlan believed that where the unlawfulness was lacking, a suit against a state official in his official capacity would violate the sovereign immunity of states.⁷⁶

The majority in *Ex parte Young* did not disagree with Justice Harlan on this basic principle. Rather, the majority offered it as foundation for the principle announced in *Ex parte Young*, that suits against state officials in their official capacity taken in order to enjoin an imminent violation of the United States Constitution are not suits against states, because defendants in such circumstances are "stripped" of their official character.⁷⁷ The majority and Justice Harlan disagreed whether a state official lost the defense of sovereign immunity when the plaintiff sought an injunction preventing a state official from bringing an unconstitutional suit. The majority held that he did,⁷⁸ while Justice Harlan argued that for an official to lose the protection of sovereign immunity, he must actually be alleged to have committed a trespass, and that "[t]he mere bringing of a suit on behalf of a State, by its Attorney General, cannot . . . make that officer a trespasser and individually liable to the party sued."⁷⁹

The entire Court in *Young* thus recognized that the reason that federal-state habeas corpus did not implicate state sovereign immunity was because it was predicated upon an allegation of official unlawfulness. If a unique exception to sovereign immunity had been recognized for habeas corpus actions generally, the "exceptional" habeas corpus context would not have supported the majority's claim that *nonhabeas* suits against state officials for prospective injunctive relief are consistent with state sovereign immunity.

⁷⁴ *Ex parte Young*, 209 U.S. 123, 198 (1908) (Harlan, J., dissenting).

⁷⁵ *Id.*

⁷⁶ *See id.*

⁷⁷ *See id.* at 167-68 (majority opinion).

⁷⁸ *See id.* at 168.

⁷⁹ *Id.* 198-99 (Harlan, J., dissenting) (emphasis omitted).

If habeas corpus "exceptionalism" had formed the basis for the constitutionality of the Habeas Corpus Act of 1867, Justice Harlan, the author of the critical case on the subject, would probably have been aware of it. Its absence from his dissent in *Ex parte Young*, which goes to lengths to distinguish habeas corpus from the suit then before the Court, suggests that Congress's Article I power was not understood to have been augmented with respect to state sovereign immunity when it affords the writ of habeas corpus as a means of bringing a suit.

To be sure, the constitutional text makes express mention of the writ of habeas corpus, and does so outside of the context of Article I, Section 8.⁸⁰ The meaning of the Clause has been controversial, and the Supreme Court has revealed a reluctance "to answer the difficult question of what the Suspension Clause protects."⁸¹ However, the Court has held that "at the absolute minimum, the Suspension Clause protects the writ 'as it existed in 1789.'"⁸²

While habeas corpus may have originated in the fourteenth century as a device for compelling appearance before the English King's instruments of judicial power,⁸³ by 1789, "*habeas corpus ad subjiciendum* was a prerogative process for securing the liberty of the subject by affording an effective means of immediate release from *unlawful* or *unjustifiable* detention."⁸⁴

The United States inherited the writ of habeas corpus *ad subjiciendum* from England. By the time of the Revolution, the writ was firmly established as a device for securing release from confinement only where that confinement was unlawful. The English Habeas Corpus Act of 1679⁸⁵ directed that judicial actors in cases within the purview of the Act "shall discharge the said Prisoner from his Imprisonment . . . unless it shall appeare . . . that the Party soe committed is detained upon a legall Process Order or Warrant, out of some Court that hath Jurisdiction of Criminall Matters or by some Warrant signed and sealed [properly]."⁸⁶ As Blackstone noted, the Act afforded a remedy from the orders of an "illegal court," under which the Court of King's Bench or Common Pleas "shall determine if the cause of imprisonment were palpably illegal."⁸⁷ With its focus on unlawful con-

80 U.S. CONST. art. I, § 9, cl. 2.

81 *INS v. St. Cyr*, 533 U.S. 289, 301 n.13 (2001).

82 *Id.* at 301 (quoting *Felker v. Turpin*, 518 U.S. 651, 663–64 (1996)).

83 *DUKER*, *supra* note 59, at 62.

84 *Id.* at 4 (second and third emphases added).

85 31 Car. 2, c. 2 (Eng.).

86 *Id.* § 2.

87 WILLIAM BLACKSTONE, 3 COMMENTARIES *131.

finement, the Habeas Corpus Act was consonant with English common law principles.⁸⁸

By 1776 some form of the writ, patterned on the English mainland model, was available in each of the British colonies that declared independence.⁸⁹ At the time of the Constitutional Convention in 1787, and through the Constitution's final ratification in 1789, each of the United States secured the writ in its own right in a form comparable to that available in England.⁹⁰ When the conventions of the several states ratified the "Privilege of the Writ of Habeas Corpus"⁹¹ in the Federal Constitution, they ratified a legal term of art with a long and well-established pedigree. Because use of the writ as a liberty-securing device was, at the time of the Founding, only applied to persons unlawfully confined, it is unlikely that the Framers or their contemporaries understood the form of habeas corpus enshrined in the constitutional text to apply to prisoners whose confinement was lawful, and not alleged to be otherwise.

To be sure, the definition of habeas corpus as used in the Constitution answers a question different from what powers, obligations, and restrictions the Suspension Clause creates. Substantial disagreement exists as to the answer to the latter question,⁹² but resolution of the

88 See 9 WILLIAM HOLDSWORTH, A HISTORY OF ENGLISH LAW 116–22 (3d ed. 1944).

89 DUKER, *supra* note 59, at 95–116.

90 *Id.* at 129.

91 U.S. CONST. art. I, § 9, cl. 2.

92 See, e.g., *INS v. St. Cyr*, 533 U.S. 289, 337–38 (2001) (Scalia, J., dissenting) (arguing that the Suspension Clause guards against “temporarily but entirely eliminating the ‘Privilege of the Writ’ for a certain geographic area or areas, or for a certain class or classes of individuals,” without “guaranteeing any particular habeas right that enjoys immunity from suspension”); *Fay v. Noia*, 372 U.S. 391, 406 (1963) (Brennan, J.) (suggesting an argument that congressional refusal to permit the federal courts to afford the writ might constitute an unconstitutional suspension of the privilege of the writ); ZECHARIAH CHAFEE, JR., *HOW HUMAN RIGHTS GOT INTO THE CONSTITUTION* 51–74 (1952) (arguing that the Clause itself guarantees a federal writ of habeas corpus not dependent upon congressional action); DUKER, *supra* note 59, at 155 (arguing that the Habeas Corpus Clause was originally understood to restrict Congress from suspending state habeas for federal prisoners except in certain cases where essential for public safety); *id.* at 126 (“[I]t has generally been accepted that the intent of the habeas clause was somehow to guarantee a federal writ of habeas corpus. Variations on this interpretation have suggested that the Clause itself guaranteed federal habeas; that the Clause created a privilege; and that the Clause directed the judiciary to make the writ routinely available.”); FREEDMAN, *supra* note 72, at 19 (arguing that the Framers understood the Habeas Clause to protect broadly against congressional interference with the power that federal *and* state courts were assumed to possess to order the release on habeas corpus of both federal and state prisoners); Francis Paschal, *The Constitution and Habeas Corpus*, 1970 DUKE L.J. 605, 607 (arguing that the Clause directs federal courts to make the writ routinely available).

controversy would not greatly inform whether the Congress has a habeas corpus power that is exceptional with respect to sovereign immunity. Whether the power to issue the writ must be granted by Congress, cannot be denied to states, inheres in the federal judicial power, cannot be revoked once granted, cannot be temporarily suspended with respect to certain classes, or all or none of the above, federal-state habeas corpus and state sovereign immunity may harmoniously coexist in light of the stripping exception of *Ex parte Young*. Federal-state habeas corpus does not implicate state sovereign immunity under *Ex parte Young* to the extent that it applies to prisoners unlawfully confined. Because of this exception, state sovereign immunity simply does not stand in the way of any recognized understanding of what the Suspension Clause guarantees.

The term habeas corpus, as used in the Constitution, was recognized at the time of the Founding, and at the turn of the twentieth century, and is recognized today as operating to release prisoners only where they were *unlawfully* confined. If the Constitution augments federal power with respect to writs of habeas corpus, it does not do so in a way that allows Congress to interfere with state sovereign immunity in a way that it otherwise could not.

In his dissent in *Katz*, Justice Thomas explains that “habeas relief simply does not offend the Framers’ view of State sovereign immunity.”⁹³ This is true with respect to habeas corpus actions predicated upon an allegation of *unlawful* confinement because of the *Ex parte Young* doctrine. The habeas corpus provision of the first Bankruptcy Act, however, operated in the absence of unlawful confinement. This suggests that the Act was understood to be consistent with sovereign immunity not because it involved a writ of habeas corpus, but rather because Congress was understood to have the power to authorize suits against states pursuant to its bankruptcy power.

3. The Bankruptcy Power of Article I Is Not Exceptional with Respect to State Sovereign Immunity

The early Congress’s passage of the habeas corpus provision of the first Bankruptcy Act supports the Court’s conclusion that “[i]nsofar as orders ancillary to the bankruptcy courts’ *in rem* jurisdiction . . . implicate States’ sovereign immunity from suit, the States agreed in the plan of the Convention not to assert that immunity.”⁹⁴ The first Bankruptcy Act, however, does not necessarily support the

93 Cent. Va. Cmty. Coll. v. Katz, 126 S. Ct. 990, 1011 n.6 (2006) (Thomas, J., dissenting).

94 *Id.* at 1002 (majority opinion).

conclusion that the congressional bankruptcy power was understood by the Framers as unique.

The *Katz* dissent's strongest critique of the majority is that "[n]othing in the text, structure, or history of the Constitution indicates that the Bankruptcy Clause, *in contrast to all of the other provisions of Article I*, manifests the States' consent to be sued by private parties."⁹⁵ While the majority may be correct that the Bankruptcy Clause was originally understood to authorize congressional interference with state sovereign immunity, Justice Thomas is also correct; nothing about the "text, structure, or history of our Constitution"⁹⁶ indicates that the Bankruptcy Clause was understood to give Congress more power to interfere with state sovereign immunity than other Article I powers.

The Court supports its conclusion that the Bankruptcy Clause was understood to have itself abrogated a portion of state sovereign immunity with several pieces of historical evidence. The first is that in the eighteenth century (as today) "[b]ankruptcy jurisdiction, at its core, is in rem," and in rem jurisdiction "does not implicate States' sovereignty to nearly the same degree as other kinds of jurisdiction."⁹⁷ The second is that one of the primary reasons for including the Bankruptcy Clause in the Constitution was to remedy "the intractable problems, not to mention the injustice, created by one State's imprisoning of debtors who had been discharged (from prison and of their debts) in and by another State."⁹⁸ The third piece of evidence is "the legislation both proposed and enacted under its auspices immediately following ratification of the Constitution"⁹⁹—specifically the habeas corpus provision of the first Bankruptcy Act.

None of these features of the Bankruptcy Power, however, set it apart from the other clauses of Article I. Though in rem jurisdiction may constitute a lesser affront to sovereignty than in personam jurisdiction, the Bankruptcy Clause is not limited to this less intrusive jurisdiction. *Katz* holds that the Bankruptcy Clause embraces both in rem and in personam jurisdiction.¹⁰⁰ While the problems addressed by the Bankruptcy Clause were unique to the subject of bankruptcies, and the Framers' "primary goal was to prevent competing sovereigns'

95 *Id.* at 1014 (Thomas, J., dissenting) (emphasis added).

96 *Id.* at 1006.

97 *Id.* at 995–96 (majority opinion) (emphasis omitted).

98 *Id.* at 996.

99 *Id.*

100 *Id.* at 1000 (recognizing that congressional power over the "'subject of Bankruptcies'" is a "unitary concept rather than an amalgam of discrete segments" (quoting U.S. CONST. art. I, § 8, cl. 3)).

interference with the debtor's discharge,"¹⁰¹ the historical evidence to which the Court points does not suggest that these problems uniquely required a surrender of sovereign immunity.¹⁰²

The best evidence pointing toward the uniqueness of the Bankruptcy Clause that the *Katz* Court considers is the habeas corpus provision of the first Bankruptcy Act. The Court notes that the "grant of habeas power is remarkable not least because it would be another 67 years, after ratification of the Fourteenth Amendment, before the writ would be made generally available to State prisoners."¹⁰³

What distinguished the habeas provision of the Bankruptcy Act from other habeas acts was not that it afforded a federal remedy for state prisoners prior to ratification of the Fourteenth Amendment. As the *Katz* Court recognized,¹⁰⁴ Congress passed two other habeas corpus acts effectuating the release of state prisoners in 1842 and 1833, respectively.¹⁰⁵ Moreover, contrary to the Court's timeline, the 1867 statute making the writ generally available to state prisoners was passed before the Fourteenth Amendment was ratified.¹⁰⁶

101 *Id.* at 1002.

102 *See id.* at 997–1001 (describing the difficulties Founding-era debtors faced when discharged in one state and subsequently imprisoned in another).

103 *Id.* at 1003.

104 *Id.* at 1003 n.11.

105 *See* Act of Aug. 29, 1842, ch. 257, § 1, 5 Stat. 539, 539 (permitting release from state prison on a federal writ for subjects of foreign states imprisoned for acts "done or omitted under any alleged right, title, authority, privilege, protection, or exemption, set up or claimed under the commission, or order, or sanction, of any foreign State or Sovereignty, the validity and effect whereof depend upon the law of nations, or under color thereof"); Act of Mar. 2, 1833, ch. 57, § 7, 4 Stat. 632, 634 (permitting release from state prison on a federal writ for those imprisoned for acts taken "in pursuance of a law of the United States").

106 The Habeas Corpus Act of 1867, discussed by the Court, became law on February 5, 1867. Act of Feb. 5, 1867, ch. 28, § 1, 14 Stat. 385, 385; *Williams v. Taylor*, 529 U.S. 362, 374–75 (2000) (Stevens, J.) (noting that Congress enacted the statute empowering federal courts to grant writs of habeas corpus to state prisoners held in violation of the Constitution, treaties, or laws of the United States in 1867); *Felker v. Turpin*, 518 U.S. 651, 659–60 (1996) (recognizing that Congress expanded the writ of habeas corpus available to state prisoners in 1867); *DUKER*, *supra* note 59, at 189. The Fourteenth Amendment was not finally ratified until July of 1868. Proclamation No. 12, 15 Stat. 708 (1868); *City of Boerne v. Flores*, 521 U.S. 507, 523 (1997) (describing the history of the Fourteenth Amendment and explaining that it "was ratified in July, 1868"); *Honda Motor Co. v. Oberg*, 512 U.S. 415, 434 n.12 (1994) (Stevens, J.) ("[T]he Fourteenth Amendment was ratified in 1868."); *United States v. Wong Kim Ark*, 169 U.S. 649, 676 (1898); Richard L. Aynes, *On Misreading John Bingham and the Fourteenth Amendment*, 103 YALE L.J. 57, 97 (1993); Donald H. Zeigler, *A Reassessment of the Younger Doctrine in Light of the Legislative History of Reconstruction*, 1983 DUKE L.J., 987, 1011.

Under the Court's recent sovereign immunity jurisprudence, Congress would not have required the additional power conferred upon it by the Fourteenth Amendment¹⁰⁷ to pass the habeas corpus provisions of 1833, 1842, and 1867. Under each of these acts, habeas corpus was available only upon an allegation of unlawful confinement. The orders that the acts permitted federal courts to issue against state custodians, therefore, did not implicate the sovereign immunity of states.¹⁰⁸

The habeas corpus provision of the Bankruptcy Act was unique because issuance of the writ pursuant to the Act did *not* require an allegation of unlawful confinement. Congress has never passed a similar law using any of its other Article I powers. This, however, does not necessarily indicate that the Framers believed that Congress *could* not have done so. Congress does not always exercise all of its power.¹⁰⁹

This is perhaps particularly true with respect to issues implicating federalism. Many scholars have recognized that the political processes established by the Constitution effectively discourage undue federal encroachment upon the authority of states.¹¹⁰ In light of this, it is not surprising that, throughout our history, Congress rarely subjected states to suit against their will. That one of Congress's rare exercises of Article I power in derogation of state sovereign immunity occurred in the bankruptcy context does not suggest that the early Congress viewed bankruptcy as exceptional.¹¹¹ More likely, it was the invasion

107 The Court has recognized that the Fourteenth Amendment enlarged the power of Congress and permits Congress to abrogate a state's sovereign immunity to enforce the substantive provisions of the Amendment. *Tennessee v. Lane*, 541 U.S. 509, 518 (2004).

108 See *supra* Part I.B.2.

109 That Congress did not necessarily use all of the power that it possessed is demonstrated by the history of federal bankruptcy law itself. As the dissent pointed out in *Katz*, for over a dozen years after the ratification of the Constitution, Congress failed to adopt a single bankruptcy law. The first Bankruptcy Act was repealed in 1803, and for the next century, the congressional bankruptcy power went largely unexercised. *Katz*, 126 S. Ct. at 1009 & n.3 (Thomas, J., dissenting).

110 See, e.g., JESSE CHOPER, JUDICIAL REVIEW AND THE NATIONAL POLITICAL PROCESS 175–84 (1980); Larry D. Kramer, *Putting the Politics Back in the Political Safeguards of Federalism*, 100 COLUM. L. REV. 215, 278–87 (2000); Herbert Wechsler, *The Political Safeguards of Federalism: The Role of the States in the Composition and Selection of the National Government*, 54 COLUM. L. REV. 543, 543–46 (1954).

111 This is particularly true given the fact that Congress's derogation from sovereign immunity in the bankruptcy context was itself extremely rare. See *Seminole Tribe v. Florida*, 517 U.S. 44, 73 n.16 (1996) ("Although the . . . bankruptcy laws have existed practically since our Nation's inception . . . there is no established tradition in the lower federal courts of allowing enforcement of those federal statutes against the States."). The first Bankruptcy Act was in force for only three years. See *supra* note 31.

of state sovereign immunity that was viewed as exceptional, regardless of the source of Congress's authority.

Justice Thomas's critique of the majority opinion is particularly fair because the majority says little to distinguish the Bankruptcy Clause from other Article I powers. The Court makes a point of explaining that its "analysis does not rest on the peculiar text of the Bankruptcy Clause as compared to other Clauses of Article I,"¹¹² and points out that "the Bankruptcy Clause, located as it is in Article I, is 'intimately connected' . . . with the Commerce Clause."¹¹³

Because, through the first Bankruptcy Act, the early Congress used its Article I power to interfere with state sovereign immunity, outside the scope of any recognized exception, the Court's pre-*Katz* jurisprudence would have recognized the first Bankruptcy Act as a law constitutionally improper for carrying out Congress's bankruptcy power.¹¹⁴ By recognizing an exception to the *Seminole Tribe* doctrine for orders ancillary to the bankruptcy courts' in rem jurisdiction, the *Katz* Court embraces not merely a different interpretation of history, but an approach toward state sovereign immunity that differs from the approach of its prior holdings and of the dissent in *Katz*.

C. *The Sixth Congress Reasonably Understood the First Bankruptcy Act To Represent a Constitutional Exercise of Its Article I Power*

Although even the early Congress could, and probably did, at times, derogate from the Constitution as it was understood by the Founding generation, the Supreme Court's recognition of early congressional practice as weighty and important evidence of the original understanding of the Constitution¹¹⁵ is well placed. Because the first Bankruptcy Act, though subject to significant controversy from its inception, was not denounced by its opponents as unconstitutional, and because its passage consisted with the early Supreme Court's exposi-

112 *Katz*, 126 S. Ct. at 1004 n.13.

113 *Id.* at 1000 n.9 (internal quotation marks omitted) (quoting *Ry. Labor Executives' Ass'n v. Gibbons*, 455 U.S. 457, 466 (1982)).

114 See *Seminole Tribe*, 517 U.S. at 93–94 (Stevens, J., dissenting) ("In confronting the question whether a federal grant of jurisdiction is within the scope of Article III, as limited by the Eleventh Amendment, I see no reason to distinguish among statutes enacted pursuant to the power granted to Congress to regulate commerce among the several States, and with the Indian tribes, Art. I, § 8, cl. 3, the power to establish uniform laws on the subject of bankruptcy, Art. I, § 8, cl. 4 . . . or indeed any other provision of the Constitution.").

115 Both the majority and the dissent in *Katz* endorse looking at early congressional practice for "valuable insight into the Framers' understanding of the Constitution." *Katz*, 126 S. Ct. at 1009 (Thomas, J., dissenting); *id.* at 1002 (majority opinion).

tion of congressional power under Article I, the first Bankruptcy Act was probably understood by its contemporaries to have been constitutional.

1. Early Congressional Practice Is Valuable Evidence of Original Meaning.

A particular act by an early Congress does not conclusively prove the constitutionality of the act. Like the Supreme Court,¹¹⁶ Congress has the potential to make mistakes, and possesses some *de facto* (even if illegitimate) power that would allow it to act beyond the scope of what the Constitution permits. The First Congress passed the Judiciary Act of 1789,¹¹⁷ part of which was held unconstitutional in *Marbury v. Madison*.¹¹⁸ Nine years later, the Fifth Congress passed the Alien Acts,¹¹⁹ together with the notorious Sedition Act, enacted July 14, 1798,¹²⁰ which made it a crime to utter or publish “any false, scandalous and malicious writing or writings against the government of the United States, or either house of the Congress of the United States, with intent to defame . . . or to bring them . . . into contempt or disrepute.”¹²¹

The Alien and Sedition Acts proved immensely unpopular. The legislatures of Kentucky and Virginia responded by passing resolutions denouncing the Acts as unconstitutional and asserting the right of a state to refuse to comply with federal legislation that the state considers unconstitutional.¹²² The more offensive Sedition Act expired in 1801,¹²³ its constitutionality not tested by the Supreme Court. But the extent of the outcry and the identity of the authors of the

116 See, e.g., *Lawrence v. Texas*, 539 U.S. 558, 578 (2003) (recognizing that *Bowers v. Hardwick*, 478 U.S. 186 (1986), “was not correct when it was decided, and is not correct today,” and overruling the Court’s prior holding). *Lawrence* and *Bowers* cannot both be correct.

117 Ch. 20, 1 Stat. 73.

118 5 U.S. (1 Cranch) 137, 174 (1803).

119 Act of July 6, 1798, ch. 66, 1 Stat. 577; Act of June 25, 1798, ch. 58, 1 Stat. 570; Act of June 18, 1798, ch. 54, 1 Stat. 566 (repealed 1802); see JEAN EDWARD SMITH, JOHN MARSHALL 239 (1996).

120 Ch. 74, 1 Stat. 596 (1798).

121 *Id.* § 2.

122 SMITH, *supra* note 119, at 246.

123 § 4, 1 Stat. at 597; SMITH, *supra* note 119, at 244. The Alien Act of June 25th endured. WILLIAM H. REHNQUIST, *ALL THE LAWS BUT ONE: CIVIL LIBERTIES IN WARTIME* 209 (1998) (observing that because the Alien Act of 1798 is “[o]ften bracketed together with the Sedition Act passed at the same time, there is a tendency to think that both were repealed as soon as Thomas Jefferson and his Jeffersonian Republicans came to power in 1801. But while the Sedition Act expired under its own terms, the

Kentucky and Virginia resolutions, Thomas Jefferson and James Madison, respectively,¹²⁴ demonstrates that substantial doubt existed as to the constitutionality of the Acts among important members of the founding generation.

That Congress is capable of misinterpreting the Constitution, however, does not prevent early congressional practice from serving as valuable evidence of original meaning. The Constitution expressly binds the members of Congress "to support this Constitution" by oath or affirmation.¹²⁵ By confining the judicial power of the United States to "Cases" and "Controversies,"¹²⁶ the Constitution necessarily places responsibility for its interpretation, where congressional power is concerned, in the hands of Congress itself in the first instance. The Constitution itself thus designates the Congress as a primary organ of constitutional interpretation, and so Congress's authoritative promulgations deserve respect.

Early congressional acts possess two additional virtues as evidence of original meaning. First, they were enacted from a vantage point close to that of the Framers. Members of the early Congresses were in a position to be familiar with the legal landscape under which the Constitution was ratified—a legal landscape that is, in many respects, very different from that of today. Second, the early Congresses included many of the Constitution's Framers—those who took an active part in constructing and/or ratifying the Constitution. Early congressional practice holds substantial value as an indicator of the Constitution's original meaning.

2. The First Bankruptcy Act, Though Controversial, Was Not Denounced as Unconstitutional by Its Opponents

The *Katz* majority emphasizes the reliability of the early Congress's belief that its actions were constitutional. As the Court points out, the first Bankruptcy Act was considered and debated during the 1790s,

during a period when State sovereign immunity could hardly have been more prominent among the nation's concerns. *Chisholm v. Georgia*, the case that had so "shock[ed]" the country in its lack of regard for State sovereign immunity . . . was decided in 1793. The

Alien Act, with minor amendments, remained on the books at the time of World War II").

124 SMITH, *supra* note 119, at 246–47.

125 U.S. CONST. art. VI, cl. 3.

126 *Id.* art. III, § 2, cl. 1; *see* *Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 174 (1803) (holding that the words of Article III are words of limitation).

ensuing five years that culminated in adoption of the Eleventh Amendment were rife with discussion of States' sovereignty and their amenability to suit.¹²⁷

Moreover, the Congress that passed the first Bankruptcy Act included among its ranks many of the Framers of the Constitution.¹²⁸ Among them in the House of Representatives was John Marshall, who had previously served as a member of the Virginia House of Delegates that ratified the Constitution,¹²⁹ and who would go on to become "The Great Chief Justice."¹³⁰ Marshall had been appointed to the select committee designated to draft the United States' first Bankruptcy Act, and was responsible for the inclusion of at least one provision in the final bill.¹³¹ Marshall cast a decisive vote in favor of the Bankruptcy Act, the bill having passed by a vote of 48-48, with the Speaker of the House breaking the tie in favor of passage.¹³²

Although the Bankruptcy Act of 1800 was exceptionally controversial, the response to it was very different than the response to the Alien and Sedition Acts. While the Alien and Sedition Acts were attacked as having been *unconstitutional*, the leading opponents of the Bankruptcy Act focused only on the Act's policy implications. As the Court in *Katz* recognized,¹³³ historians who have undertaken to survey the arguments made against the first Bankruptcy Act have made no mention of claims that the Act was constitutionally unsound.¹³⁴ This suggests strongly that the first Bankruptcy Act, though seen as imprudent by some, was largely understood to have comported with the Constitution.

127 Cent. Va. Cmty. Coll. v. Katz, 126 S. Ct. 990, 1003 (2006) (citation omitted).

128 See Haines, *supra* note 32, at 186.

129 SMITH, *supra* note 119, at 112.

130 See CHARLES F. HOBSON, THE GREAT CHIEF JUSTICE: JOHN MARSHALL AND THE RULE OF LAW (1996).

131 SMITH, *supra* note 119, at 258.

132 10 ANNALS OF CONG. 534 (1800).

133 Cent. Va. Cmty. Coll. v. Katz, 126 S. Ct. 990, 1003 (2006).

134 See BRUCE H. MANN, REPUBLIC OF DEBTORS: BANKRUPTCY IN THE AGE OF AMERICAN INDEPENDENCE 214-20 (2002); F. REGIS NOEL, A HISTORY OF THE BANKRUPTCY LAW 128-33 (1919); WARREN, *supra* note 31, 19-20; Noel and Warren each explain the dissatisfaction with the law as having been based on three grounds: (1) the difficulty of travel to the distant and unpopular federal courts; (2) the small dividends paid to creditors; and (3) the comparative advantage the system gave to rich and fraudulent debtors. See NOEL, *supra*, at 130-31; WARREN, *supra* note 31, 19-20.

3. Congress's First Exercise of the Congressional Bankruptcy Power Comported with the Early Supreme Court's Exposition of Congressional Power.

The habeas corpus provision in the Bankruptcy Act of 1800 was probably understood, at least by those who passed it, to have been an exercise of Congress's authority "To make all Laws which shall be necessary and proper for carrying into Execution"¹³⁵ the "Power . . . To establish . . . uniform Laws on the subject of Bankruptcies throughout the United States."¹³⁶

Such an understanding would have been reasonable in light of the early Supreme Court's explanation of the Necessary and Proper Clause. Chief Justice John Marshall famously described what makes a law "necessary and proper" in *McCulloch v. Maryland*¹³⁷: "Let the end be legitimate, let it be within the scope of the constitution, and all means which are appropriate, which are plainly adapted to that end, which are not prohibited, but consist with the letter and spirit of the constitution, are constitutional."¹³⁸ According to Marshall, the terms of the Clause "purport to enlarge, not to diminish the powers vested in the government."¹³⁹

Marshall's explanation of "necessary and proper" does have limits. A means "necessary and proper" is a means "not prohibited" and "consist[ent] with the letter and spirit" of the Constitution.¹⁴⁰ The Chief Justice's discussion of another of Congress's enumerated powers, the Commerce Clause,¹⁴¹ strongly suggests that an interference with state sovereign immunity would not fall outside these limits. In describing the commerce power in *Gibbons v. Ogden*,¹⁴² Chief Justice Marshall wrote for the Court that

[t]his power, *like all others vested in Congress*, is complete in itself, may be exercised to its utmost extent, and acknowledges no limitations, other than are prescribed in the constitution. . . . If, as has always been understood, the sovereignty of Congress, though limited to specified objects, is plenary as to those objects, the power over commerce with foreign nations, and among the several States, is vested in Congress *as absolutely as it would be in a single government*.¹⁴³

135 U.S. CONST. art. I, § 8, cl. 18.

136 *Id.* cl. 4.

137 17 U.S. (4 Wheat.) 316 (1819).

138 *Id.* at 421.

139 *Id.* at 420.

140 *Id.* at 421.

141 U.S. CONST. art. I, § 8, cl. 3.

142 22 U.S. (9 Wheat.) 1 (1824).

143 *Id.* at 196–97 (emphasis added).

If the Bankruptcy Clause, like the Commerce Clause and the Necessary and Proper Clause, vests Congress with power as absolute as it would be in a single government, limited to specified objects but plenary as to those objects, members of the early Congress could reasonably have believed themselves to possess the constitutional power to enact the habeas corpus provision of the Bankruptcy Act of 1800.

The historical context in which the first Bankruptcy Act was passed suggests that the Act's habeas corpus provision was "appropriate" and "plainly adapted" to the end of crafting a uniform bankruptcy law.¹⁴⁴ Discharging imprisoned debtors on a case-by-case basis through writs of habeas corpus would be a sensible way for a "single government" to administer a newly enacted bankruptcy law.

D. The Supreme Court's Modern Federalism Jurisprudence Draws a Different Line Between Proper and Improper than Did the Early Supreme Court

The Marshall Court's line between "proper" and "improper" exercises of congressional power accords directly with the text of the Constitution itself. Congress's power is expressly given in Article I, Section 8. The specified objects of congressional power are numerous and set out with particularity, suggesting that the words of Article I, Section 8 are words of limitation. The Tenth Amendment confirms this, by providing that "[t]he powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people."¹⁴⁵

In light of the phrasing of Article I, Section 8, the Tenth Amendment, and Chief Justice Marshall's language in *McCulloch*, a law would not be "proper" if it is not addressed to "lay[ing] and collect[ing] Taxes,"¹⁴⁶ "borrow[ing] money on the credit of the United States,"¹⁴⁷ "regulat[ing] Commerce,"¹⁴⁸ establishing a uniform bankruptcy or naturalization law,¹⁴⁹ etc.

This is itself perhaps an unremarkable proposition. Justice O'Connor quoted Justice Story to explain that

144 See *Cent. Va. Cmty. Coll. v. Katz*, 126 S. Ct. 990, 996–1000, 1002 (2006) (describing state bankruptcy law in the early republic and recognizing that in enacting the first Bankruptcy Act "the Framers' primary goal was to prevent competing sovereigns' interference with the debtors' discharge").

145 U.S. CONST. amend. X.

146 *Id.* art. I, § 8, cl. 1.

147 *Id.* cl.2.

148 *Id.* cl.3.

149 *Id.* cl.4.

the Tenth Amendment "States but a truism that all is retained which has not been surrendered." As Justice Story put it, "[t]his amendment is a mere affirmation of what, upon any just reasoning, is a necessary rule of interpreting the constitution. Being an instrument of limited and enumerated powers, it flows irresistibly, that what is not conferred, is withheld, and belongs to the State authorities."¹⁵⁰

If the Tenth Amendment and the powers enumerated in Article I demarcate the line between laws that are "proper" and those that are not, a law addressed to carrying out the regulation of "Commerce . . . with the Indian Tribes,"¹⁵¹ would be proper even if it infringed the sovereign immunity of the states. The Court itself has taken this view in cases decided in the not-too-distant past.¹⁵² When the Supreme Court overruled these cases¹⁵³ and held that Congress may not subject states to suit in a given area of law without their consent "[e]ven when the Constitution vests in Congress complete lawmaking authority over [that] area,"¹⁵⁴ the Court drew a different line between "proper" and "improper" than that which the text itself draws in explicit terms.

The Supreme Court's modern jurisprudence thus gives somewhat different content to the Necessary and Proper Clause than did the Marshall Court by recognizing that some laws, even if "necessary" for carrying out one of Congress's enumerated powers, are not "proper"¹⁵⁵ if they are carried out as though the United States were a

150 *New York v. United States*, 505 U.S. 144, 156 (1992) (citation omitted) (quoting 3 J. STORY, COMMENTARIES ON THE CONSTITUTION OF THE UNITED STATES 752 (1833)).

151 U.S. CONST. art. I, § 8, cl. 3.

152 See *Pennsylvania v. Union Gas Co.*, 491 U.S. 1, 19–20 (1989) (plurality opinion) ("[I]t must be that, to the extent that the States gave Congress the authority to regulate commerce, they also relinquished their immunity where Congress found it necessary, in exercising this authority, to render them liable."); *Parden v. Terminal Ry.* 377 U.S. 184, 192 (1964) ("By empowering Congress to regulate Commerce . . . the States necessarily surrendered *any* portion of their sovereignty that would stand in the way of such regulation. Since imposition of the FELA right of action upon interstate railroads is within the congressional regulatory power, it must follow that application of the Act to such a railroad cannot be precluded by sovereign immunity." (emphasis added)), *overruled by* *Coll. Sav. Bank v. Fla. Prepaid Postsecondary Educ. Expense Bd.*, 527 U.S. 666, 680 (1999).

153 See *Seminole Tribe v. Florida*, 517 U.S. 44, 63–67, 72 (1996); see also *Coll. Sav. Bank* 527 U.S. at 680 ("[W]hatever may remain of our decision in *Parden* is expressly overruled.").

154 *Seminole Tribe*, 517 U.S. at 72.

155 *Printz v. United States*, 521 U.S. 898, 923–24 (1997) ("When a 'La[w] . . . for carrying into Execution' the Commerce Clause violates [certain principles of state sovereignty] it is not a 'La[w] . . . *proper* for carrying into Execution' the Commerce

single government. Under the modern pre-*Katz* approach, the habeas corpus provision of the first Bankruptcy Act would not appear to be a “proper” law, because it interferes with state sovereign immunity.¹⁵⁶

In articulating its modern “necessary but not proper” doctrine, the Court in *Printz v. United States*¹⁵⁷ cites an article by Gary Lawson and Patricia B. Granger.¹⁵⁸ The article identifies substantial evidence that “the word ‘proper’ was often used during the Founding era to describe the powers of a governmental entity as peculiarly within the province or jurisdiction of that entity.”¹⁵⁹ Lawson and Granger suggest that even laws “within Congress’s enumerated powers but that significantly impair the autonomy of state governments can be ‘improper’ because such laws contravene constitutionally ‘proper’ principles of federalism,”¹⁶⁰ though they admit that drawing the line between “proper” and “improper” is not an easy task.¹⁶¹

The Marshall Court and the Court of today have both recognized the constitutional necessity of distinguishing between a “proper” and an “improper” exercise of congressional power, but they draw the line between the two differently.

The modern Supreme Court has drawn the line between “proper” and “improper” by looking at those attributes of statehood at the time of the founding that were understood to be fundamental to sovereignty. A law that interferes with certain of these attributes is improper, regardless of how closely related the regulation is to a power that the Constitution gives to Congress.¹⁶²

Clause.” (alterations and omissions in original) (quoting U.S. CONST. art. I, § 8, cl. 18)). The Court has interpreted the Necessary and Proper Clause similarly in the state sovereign immunity context. *Alden v. Maine*, 527 U.S. 706, 732 (1999) (“Nor can we conclude that the specific Article I powers delegated to Congress necessarily include, by virtue of the Necessary and Proper Clause or otherwise, the incidental authority to subject the States to private suits as a means of achieving objectives otherwise within the scope of the enumerated powers.”).

156 See *Alden*, 527 U.S. at 732.

157 521 U.S. 898.

158 *Id.* at 924

159 Gary Lawson & Patricia B. Granger, *The “Proper” Scope of Federal Power: A Jurisdictional Interpretation of the Sweeping Clause*, 43 DUKE L.J. 267, 297 (1993).

160 *Id.* at 332.

161 *Id.*

162 See *Alden v. Maine*, 527 U.S. 706, 754 (1999) (holding that it is not “proper” for Congress to use its Article I power to subject states to suit in their own courts); *Seminole Tribe v. Florida*, 517 U.S. 44, 47 (1996) (holding that Congress may not use its Article I power to subject states to suit in federal court); *Printz*, 521 U.S. at 935 (holding that Congress may not use its Article I powers to “commandeer” state executive officials); *New York v. United States*, 505 U.S. 144, 175 (1992) (holding that Congress may not use its Article I power to “commandeer” state legislatures).

The Marshall Court drew the line based on the nexus between the law and Congress's enumerated powers. If Congress's power is plenary as to the objects specified in the Constitution and vested as absolutely as it would be in a single government, the line between a "proper" and "improper" bankruptcy law would seem to fall where the law ceases to be a uniform law on the subject of bankruptcies or a law plainly adapted to creating one.

II. THE MODERN SUPREME COURT'S EXPANSIVE COMMERCE CLAUSE JURISPRUDENCE RENDERS ILLUSORY THE MEANS BY WHICH THE TEXT OF THE CONSTITUTION ORIGINALLY PROTECTED STATE AUTONOMY

A. *The Modern Understanding of Congress's Commerce Power Encompasses Virtually Everything*

The shift in the Court's approach may be informed by the fact that the Tenth Amendment, if applied literally today, would reserve very little to the states. Because the text represents the "flipside" of Article I, for any power to be "reserved to the States,"¹⁶³ Article I, Section 8 must have meaningful limits. Under the Court's contemporary Commerce Clause jurisprudence, however, it does not. The Court's most recent case describing Congress's commerce power explained that Congress may regulate any activity so long as there exists a rational basis for concluding that the activity, taken in the aggregate, would substantially affect interstate commerce.¹⁶⁴ Congress may also regulate activity that is *purely* local, so long as the activity is "part of an economic 'class of activities' that have a substantial effect on interstate commerce."¹⁶⁵ The Supreme Court's modern jurisprudence recognizes the Article I commerce power as covering "virtually everything."¹⁶⁶

163 U.S. CONST. amend. X.

164 *Gonzales v. Raich*, 125 S. Ct. 2195, 2208 (2005). For a discussion of the impact of *Raich* on modern Commerce Clause jurisprudence, see Tara M. Stuckey, Note, *Jurisdictional Hooks in the Wake of Raich: On Properly Interpreting Federal Regulations of Interstate Commerce*, 81 NOTRE DAME L. REV. (forthcoming 2006).

165 *Raich*, 125 S. Ct. at 2205.

166 DAVID P. CURRIE, *THE CONSTITUTION IN THE SUPREME COURT: THE FIRST HUNDRED YEARS, 1789–1888*, at 170 (1985); see, e.g., *Scarborough v. United States*, 431 U.S. 563, 576–78 (1977) (finding a sufficient nexus where the regulated firearm's only asserted connection to commerce was having crossed state lines *prior to the enactment of the statute*); *Wickard v. Filburn*, 317 U.S. 111, 127–28 (1942) (upholding a federal law regulating the growing of wheat for personal consumption). But see *United States v. Morrison*, 529 U.S. 598, 601–02 (2000) (holding that the commerce power does not extend to providing a federal civil remedy for the victims of gender-motivated vio-

Part of the explanation for this expansive understanding of the Commerce Clause is the reality that “[t]he volume of interstate commerce [has] expanded considerably in the last 200 years.”¹⁶⁷ Importantly, however, this does not provide the entire explanation. The Court itself substantially changed the legal definition of the commerce power, particularly during the late nineteenth and early twentieth centuries.¹⁶⁸ Arguably, the Court could not have avoided this course, having been coerced by President Roosevelt’s “court packing” scheme.¹⁶⁹ Whether this was the cause, the Court’s current view of what constitutes an exercise of Congress’s “Power . . . To regulate Commerce . . . among the several States,”¹⁷⁰ is not merely an application of the original meaning of the text to the commercial landscape of today.

B. The Original Understanding of Congress’s Commerce Power Did Not Encompass Virtually Everything

The definition of “commerce” that Chief Justice Marshall gave when he described the power as having been “vested in Congress as absolutely as it would be in a single government”¹⁷¹ illustrates that the modern Supreme Court gives the Commerce Clause a different meaning than did the Founding generation. As Chief Justice Marshall described it, “[c]ommerce . . . is intercourse. It describes the commercial intercourse between nations, and parts of nations, in all its branches, and is regulated by prescribing rules for carrying on that intercourse.”¹⁷²

lence); *United States v. Lopez*, 514 U.S. 549, 561 (1995) (holding that the commerce power does not extend to a prohibition against possession of firearms in school zones). *Morrison* and *Lopez* do not render Professor Currie’s conclusion unreasonable. See *Raich*, 125 S. Ct. at 2195.

167 *New York*, 505 U.S. at 158.

168 See CHEMERINSKY, CONSTITUTIONAL LAW *supra* note 72, at §§ 3.3.3–3.3.5 (discussing Supreme Court’s significant changes in Commerce Clause jurisprudence since the Founding).

169 In 1937 Roosevelt sought congressional legislation that would increase the size of the Supreme Court by adding one justice for each currently serving who was over the age of seventy. This would have allowed Roosevelt to appoint six new justices—a number sufficient to secure a majority on the Court that presumably would have upheld New Deal programs whatever their relationship to interstate commerce. *Id.* § 3.3.4, at 251; see also ROBERT H. JACKSON, THE STRUGGLE FOR JUDICIAL SUPREMACY, 187–96 (1941) (discussing the Roosevelt court packing endeavor).

170 U.S. CONST. art. I, § 8, cls. 1, 3.

171 *Gibbons v. Ogden*, 22 U.S. (9 Wheat.) 1, 197 (1824).

172 *Id.* at 189–90.

The view that Congress's Article I, Section 8, Clause 3 power extended only to prescribing rules for the carrying on of commercial intercourse consists with an ample amount of historical evidence as to the meaning that members of the founding generation ascribed to the term "commerce." According to Professor Randy Barnett, who scrutinized the text of the Constitution, contemporary dictionaries, statements made at the Constitutional Convention, the *Federalist Papers*, and statements made at the ratification conventions, an original understanding of "[c]ommerce" means the trade or exchange of goods (including the means of transporting them).¹⁷³ Justice Thomas, surveying historical evidence, has also found that "[a]t the time the original Constitution was ratified, 'commerce' consisted of selling, buying, and bartering, as well as transporting for these purposes."¹⁷⁴ According to Justice Thomas, "[a]s one would expect, the term 'commerce' was used in contradistinction to productive activities such as manufacturing and agriculture."¹⁷⁵

Although scholars worthy of respect have contested this view of the original meaning of "commerce,"¹⁷⁶ the text of the Constitution itself confirms that whatever the original meaning of the power to regulate interstate commerce might be, it is not the power to regulate "virtually everything."¹⁷⁷ If it were, the seventeen other Clauses of Article I would be superfluous, along with the Tenth Amendment.¹⁷⁸

173 Randy E. Barnett, *The Original Meaning of the Commerce Clause*, 68 U. CHI. L. REV. 101, 146 (2001).

174 *United States v. Lopez*, 514 U.S. 549, 585 (1995) (Thomas, J., concurring) (citing SAMUEL JOHNSON, A DICTIONARY OF THE ENGLISH LANGUAGE 361 (London, W. Strahan 4th ed. 1773)).

175 *Id.* at 586.

176 See, e.g., Grant S. Nelson & Robert J. Pushaw, Jr., *Rethinking the Commerce Clause: Applying First Principles To Uphold Federal Commercial Regulations but Preserve State Control over Social Issues*, 85 IOWA L. REV. 1, 13–14 (1999) (arguing that the original meaning of commerce encompassed any "gainful activity"); Richard A. Posner, *Past-Dependency, Pragmatism, and Critique of History in Adjudication and Legal Scholarship*, 67 U. CHI. L. REV. 573, 595 & n.56 (2000) (characterizing Justice Thomas's concurrence in *Lopez* as an example of "highly debatable historical excursus by originalist judges").

177 See Nelson & Pushaw, *supra* note 176, at 118–19 (recognizing that the authors' interpretation of the commerce power is narrower than that of the Supreme Court).

178 See *Lopez*, 514 U.S. at 588–89 (Thomas, J., concurring) (describing those matters expressly covered by Article I, Section 8 that substantially affect commerce, and characterizing them as surplusage under the Court's Commerce Clause jurisprudence).

This is not a construction that the words of the Constitution reasonably permit.¹⁷⁹

C. While the Tenth Amendment's Text Itself May Once Have Meaningfully Protected State Autonomy, It No Longer Does

Viewing the enumerated powers as having substantive limits, Chief Justice Marshall left a substantial amount of power in state hands when he declared the commerce power as "vested in Congress as absolutely as it would be in a single government."¹⁸⁰ While Congress's power was plenary as to "prescribing rules for carrying on . . . intercourse,"¹⁸¹ and as to the other "specified objects"¹⁸² found in Article I, the substantial amount of law that could not be said to have been addressed to these ends would not have been "proper for carrying into Execution"¹⁸³ Congress's power.

With meaningful limitations on Congress's enumerated powers, the Tenth Amendment performs real work, reserving to the states a meaningful sphere of autonomy that can be legally asserted against congressional infringement. The text of the Tenth Amendment coupled with the text of Article I constitutes an original, constitutional command that the states retain a sphere of autonomy into which the federal government does not have the *power* (as opposed to the where-withal) to enter.

However, because Congress's commerce power has been judicially determined to extend to "virtually everything," a functional application of the Tenth Amendment's text protects the flipside—"virtually nothing." An originalist may be disinclined to accept this as the end of the inquiry. The Court's Commerce Clause jurisprudence may today allow "[t]he Federal Government [to] undertake[] activities today that would have been unimaginable to the Framers,"¹⁸⁴ but this is largely the Court's doing. It is not the text of the Constitution itself that has so empowered the federal government.¹⁸⁵ That the federal government may undertake, in some manner, virtually any activity that it has the wherewithal to do does not necessarily require a conclusion that the federal government may deny to states the attributes

179 See *Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 174 (1803) ("It cannot be presumed that any clause in the constitution is intended to be without effect; and, therefore, such a construction is inadmissible, unless the words require it.").

180 *Gibbons v. Ogden*, 22 U.S. (9 Wheat.) 1, 197 (1824).

181 *Id.* at 190.

182 *Id.* at 197.

183 U.S. CONST. art. I, § 8, cl. 18.

184 *New York v. United States*, 505 U.S. 144, 157 (1992).

185 See *supra* notes 168–79 and accompanying text.

which make them states in a federal union, rather than mere federal bureaucracies.

III. THE SUPREME COURT'S CONTEMPORARY SOVEREIGN IMMUNITY JURISPRUDENCE IS A SURROGATE FOR THE ORIGINAL CONSTITUTIONAL MEANS OF PROTECTING STATE AUTONOMY

A. *The Originalist's Dilemma: The Original Means of Protecting State Autonomy No Longer Function To Achieve Their Original Ends*

An expansive view of the subjects upon which Congress may legislate suggests a minimalist view of state power because the Framers chose to protect state autonomy through enumeration and reservation. This creates an interpretive dilemma for the originalist¹⁸⁶ who sees the Court's Commerce Clause jurisprudence as fairly settled. Such an originalist must confront the direct tension between the original constitutional command of federalism, and the original constitutional means of protecting federalism. Adherence to one original constitutional command requires divergence from the other.

1. Reversion to the Original Understanding of the Commerce Clause Is an Impractical Solution to the Originalist's Dilemma

One, perhaps obvious, solution to this dilemma is for the Court to reconsider its Commerce Clause jurisprudence. Justice Thomas has suggested this approach.¹⁸⁷ While this method would preserve both the federalism that the Constitution commands, and the means that the Constitution prescribes for protecting it, it would probably do more harm than good. Our federal government is enormously large, and it pervades the lives of individuals to a degree far greater than it did when the Court regularly sought to enforce the constitutional limits on federal power.

Such a course would require dismantling much of Pennsylvania Avenue. We have structured our government on an expansive understanding of federal power for more than half a century. Private individuals and state governments have diverted their energy and resources to other efforts as the federal government has taken respon-

186 I use the term "originalist" to describe someone who seeks to determine the meaning that a reasonable person would attach to the words employed in the Constitution—the instrument itself—at the time of the Founding.

187 See *United States v. Lopez*, 514 U.S. 549, 585 (1995) (Thomas, J., concurring).

sibility for more and more things, on the understanding that it had the power to do so.

Whatever value there might have been in allowing our government to develop from the nineteenth to the twenty-first century without expansive federal power can probably not be recaptured by a judicially compelled dismantling of the current federal government, and the risks of such a course appear substantial. Although the relationship between the Constitution, *stare decisis*, and wrongly decided cases is beyond the scope of this work, the Constitution probably does not compel the Court to inflict severe pain on the people of the United States in order to correct its own errors—at least in the absence of gross injustice.¹⁸⁸

If the originalist accepts the continuing viability of an expansive Commerce Clause jurisprudence, he or she is left with two options. One is to retain the textual mechanism by which the Constitution protects federalism. Coupling the original meaning of the text of the Tenth Amendment and the Necessary and Proper Clause with the modern meaning of the Commerce Clause is not a difficult task. However, the result is virtually no protection for federalism, and virtually no sphere of state autonomy into which Congress cannot intrude.¹⁸⁹ The other option is the far more difficult task of using nontextual mechanisms to protect the original constitutional command of federalism.

B. The Court's Solution: The Original Constitutional Command of Federalism

In recent years, the Supreme Court has rejected the “easy” approach. Instead the Court gives life to the original, constitutional command of federalism where an original reading of the Tenth

188 Cf. *Brown v. Bd. of Educ.*, 347 U.S. 483 (1954) (overruling the “separate but equal” doctrine of *Plessy v. Ferguson*, 163 U.S. 537, 552 (1896)). Justice Thomas does not suggest a complete abandonment of established Commerce Clause jurisprudence. *Lopez*, 514 U.S. at 585 (Thomas, J., concurring). However, even a jurisprudence that simply treats “productive activities such as manufacturing and agriculture,” *id.* at 586, as being outside the scope of the federal commerce power would place in constitutional doubt a substantial portion of the federal government. This is not to say that the Court should not continue to delineate the peripheral limits of the modern, expansive understanding of commerce. *E.g.*, *United States v. Morrison*, 529 U.S. 598, 601–02 (2000) (holding that the commerce power does not extend to providing a federal civil remedy for the victims of gender-motivated violence); *Lopez*, 514 U.S. at 561 (majority opinion) (holding that the commerce power does not extend to a prohibition against possession of firearms in school zones). The Constitution does not require that congressional commerce power extend beyond *virtually* everything.

189 See *supra* Part II.C.

Amendment and the Necessary and Proper Clause coupled with a modern reading of the Commerce Clause would not require it to.

In *New York v. United States*,¹⁹⁰ Justice O'Connor, writing for the Court, described a nontextual approach to the federalist command that the Tenth Amendment embodies.

[U]nder the Commerce Clause Congress may regulate publishers engaged in interstate commerce, but Congress is constrained in the exercise of that power by the First Amendment. The Tenth Amendment likewise restrains the power of Congress, but this limit is not derived from the text of the Tenth Amendment itself, which, as we have discussed, is essentially a tautology. Instead, the Tenth Amendment confirms that the power of the Federal Government is subject to limits that may, in a given instance reserve power to the States.¹⁹¹

The Tenth Amendment's text no longer does the work of reserving the state power that it claims to reserve. The Court has chosen to give preference to the substance of the original constitutional command of federalism over the form, and treats the reserved power of states as an affirmative limit on the congressional power conferred by Article I. The Tenth Amendment clearly recognizes substantial power as reserved to the states, and the Court has effectively said that it does not view this power as having been expunged by the Court's expansive Commerce Clause jurisprudence.

By giving life to the constitutional command of federalism while retaining an expansive congressional commerce power, the Court has created a difficult challenge for itself. If enumeration and reservation no longer distinguishes the "proper" from the "improper," what does?

1. The Preemption Problem Renders Impossible an Approach to Federalism That Corresponds to the Original Understanding of Congress's Enumerated Powers

One apparent solution would be to treat the affirmative Commerce Clause power according to the Court's modern Commerce Clause jurisprudence, while treating the Tenth Amendment as reserving those powers that the states would have been understood to have retained under an originalist view of the Commerce Clause. The doctrine of preemption forecloses this approach.

"[U]nder the Supremacy Clause, from which our pre-emption doctrine is derived, 'any state law, however clearly within a State's acknowledged power, which interferes with or is contrary to federal law,

190 505 U.S. 144 (1992).

191 *Id.* at 156–57.

must yield.’”¹⁹² The exercise of power by the federal government will necessarily restrict the ability of states to act in that same field. If both Congress and a state sought to legislate in incompatible ways in the “periphery”¹⁹³ of the Commerce Clause, one sovereign’s act would have to trump the other. Either Congress would lose its expansive Commerce Clause power, or the states would be in a position no different than if the Court recognized no judicially enforceable sphere of state autonomy. It would be impossible to allow Congress to legislate “virtually anything” under the Commerce Clause, while reserving to states all power in respect to matters beyond “prescribing rules for carrying on . . . intercourse.”¹⁹⁴

Because of the preemption problem, an expansive view of the commerce power makes impossible a federalism jurisprudence that perfectly corresponds to the allocation of power set forth by the constitutional text. Either congressional power will extend into areas of state sovereignty that the text, as originally understood, left with the states, or Congress will be denied some power that it would have had under the Constitution as originally understood.

2. First Attempt: Traditional State Functions

Because of the preemption problem, over or under inclusiveness will necessarily be a feature of any approach toward reconciling the constitutional command of federalism with an expansive interpretation of the Commerce Clause. Recognizing this, one option is to give life to the original constitutional command of federalism by recognizing a sphere of inviolate state autonomy where states act “in their capacities as sovereign governments.”¹⁹⁵ The Court followed this approach in *National League of Cities v. Usery*,¹⁹⁶ in which it held that laws which “operate to directly displace the States’ freedom to structure integral operations in areas of traditional governmental functions, they are not within the authority granted Congress by [the Commerce Clause].”¹⁹⁷ In so holding, the Court recognized a limit on the substantive ends at which Congress could aim using its Article I

192 *Gade v. Nat’l Solid Wastes Mgmt. Ass’n*, 505 U.S. 88, 108 (1992) (quoting *Felder v. Casey*, 487 U.S. 131, 138 (1988)).

193 I use the term “periphery” to refer to the sphere of authority that the Court currently recognizes Congress to have, but that extends beyond prescribing rules for carrying on commercial intercourse.

194 *Gibbons v. Ogden*, 22 U.S. (9 Wheat.) 1, 190 (1824).

195 *Nat’l League of Cities v. Usery*, 426 U.S. 833, 852 (1976), *overruled by* *Garcia v. San Antonio Metro. Transit Auth.*, 469 U.S. 528 (1985).

196 426 U.S. 833.

197 *Id.* at 852

power, and struck down portions of the Fair Labor Standards Act which required the payment of the minimum wage to state and local employees.¹⁹⁸

The difficulty of an approach that aims at the substance of the regulation—that is, the object, as opposed to the means by which the object is achieved—is that an expansive reading of the Commerce Clause removes the constitutional standards for determining the proper objects of congressional regulation. Because the commerce power reaches virtually every object, an effort to limit the permissible objects of congressional regulation is really an effort to limit what substantively constitutes a regulation of interstate commerce. Because the “traditional governmental functions” approach does not purport to turn on the relationship that the object of regulation has to interstate commerce, it is open to the charge that it “invites an unelected federal judiciary to make decisions about which State policies it favors and which ones it dislikes.”¹⁹⁹

3. Second Attempt: The Political Safeguards of Federalism

The Court lobbed this charge against itself in *Garcia v. San Antonio Metropolitan Transit Authority*²⁰⁰ and expressly overruled *Usery*.²⁰¹ In its place, to secure the constitutional command of federalism the Court relied on the political processes set forth in the Constitution. As Justice Blackmun wrote for the Court:

Of course, we continue to recognize that the States occupy a special and specific position in our constitutional system and that the scope of Congress' authority under the Commerce Clause must reflect that position. But the principal and basic limit on the federal commerce power is that inherent in all congressional action—the built-in restraints that our system provides through State participation in federal governmental action. The political process ensures that laws that unduly burden the States will not be promulgated.²⁰²

According to *Garcia*, “State sovereign interests, then, are more properly protected by procedural safeguards inherent in the structure of the federal system than by judicially created limitations on federal power.”²⁰³

198 *Id.* at 851–52.

199 *Garcia*, 469 U.S. at 546.

200 469 U.S. 528.

201 *Id.* at 557.

202 *Id.* at 556.

203 *Id.* at 552.

Whether the so-called “political safeguards of federalism” effectively provide protection for state autonomy is a highly debatable proposition.²⁰⁴ Whatever protection they do afford, however, the text of the Constitution specifically provides *in addition to* the constraints imposed by Article I, Section 8 and the Tenth Amendment. As something that the text of the Constitution independently requires, the so-called political safeguards of federalism cannot be a meaningful surrogate for what the text of the Constitution originally guaranteed through enumeration and reservation.

4. The Court’s Modern Approach Before *Katz*: Transsubstantive, Affirmative Limitations on the Means of Congressional Regulation

The Court in recent years has taken an approach that gives life to the original constitutional command of federalism independent of the political safeguards enshrined in the text. In several contexts in recent years, the Court has employed a framework that applies principles of state autonomy as judicially enforceable affirmative limits on congressional power. In *New York v. United States*,²⁰⁵ the Court held that Congress may not “commandeer” state legislatures by requiring them to legislate in furtherance of a federal program.²⁰⁶ In *Printz v. United States*,²⁰⁷ the Court held that Congress may not “commandeer” state *executive* officials by requiring them to *execute* a federal program.²⁰⁸

Prior to *Katz*,²⁰⁹ the Court had taken a very similar approach in the state sovereign immunity context, holding that Congress may not

204 Compare CHOPER, *supra* note 110, at 175–84 (arguing that federal courts should regard constitutional federalism questions as non-justiciable and leave their final resolution to the political process), Kramer, *supra* note 110, at 293 (“There *are* ‘political safeguards’ of federalism, safeguards that have a longer pedigree and a stronger claim to constitutional legitimacy than the current Supreme Court’s clumsy bid to impose its will on Congress.”), and Wechsler, *supra* note 110, at 559 (arguing that political safeguards do effectively protect federalism), with Bellia, *supra* note 19, at 1012 (“[W]hen, by operation of the political safeguards of federalism, Congress directly divests state institutions of power, it may leave behind political safeguards of federalism that, as a functional matter, are something less than they were before Congress acted.”).

205 505 U.S. 144 (1992).

206 *Id.* at 175.

207 521 U.S. 898 (1997).

208 *Id.* at 933.

209 Cent. Va. Cmty. Coll. v. Katz, 126 S. Ct. 990 (2006).

use any of its Article I powers to subject states to suit without their consent.²¹⁰

The Court's modern approach differs from the "traditional governmental functions" approach of *Usery*²¹¹ in that it focuses not on the ultimate object of regulation, but rather the means by which the object is regulated. Congress thus retains its power to regulate "virtually anything" pursuant to the Commerce Clause, but the means that it uses for doing so must be "necessary and proper." When a means employed by Congress intrudes on certain fundamental principles of state sovereignty, it is not a means proper for regulating the objects of congressional power.²¹²

This approach differs from the *Usery* approach and the approach the Tenth Amendment contemplates in that it is transsubstantive. Certain means are off limits for Congress, regardless of the end that Congress seeks to achieve. Even if the object of a law were clearly within the scope of Congress's Article I power as that power was originally understood, and even if the means Congress used were plainly adapted to achieving that object, the law would be unconstitutional if it violated certain principles of state sovereignty such as state sovereign immunity.²¹³ Under this approach the first Bankruptcy Act's interference with state sovereign immunity does not compel a conclusion that Congress may today interfere with state sovereign immunity when exercising its bankruptcy power. The founding generation understood the Constitution to protect federalism by limiting the

210 *Alden v. Maine*, 527 U.S. 706, 754 (1999) (holding that Congress may not use its Article I power to subject states to suit in *state* courts); *Seminole Tribe v. Florida*, 517 U.S. 44, 47 (1996) (holding that Congress may not use its Article I power to subject states to suit in *federal* courts).

211 *Nat'l League of Cities v. Usery*, 426 U.S. 833, 852 (1976), *overruled by* *Garcia v. San Antonio Metro. Transit Auth.*, 469 U.S. 528 (1985).

212 See cases cited *supra* note 162.

213 The Court appears to take a transsubstantive approach in much of its federalism jurisprudence. See *Alden*, 527 U.S. at 754 ("In light of history, practice, precedent, and the structure of the Constitution, we hold that the States retain immunity from private suit in their own courts, an immunity beyond *the congressional power to abrogate by Article I legislation.*" (emphasis added)); *Printz*, 521 U.S. at 924 ("[E]ven where Congress has the authority under the Constitution to pass laws requiring or prohibiting certain acts, it lacks the power directly to compel the states to require or prohibit those acts." (internal quotation marks omitted) (quoting *New York v. United States*, 505 U.S. 144, 166 (1992))); *Seminole Tribe*, 517 U.S. at 72 ("Even when the Constitution vests in Congress complete lawmaking authority over a particular area, the Eleventh Amendment prevents congressional authorization of suits by private parties against unconsenting States."); *New York*, 505 U.S. at 178 ("*No matter how powerful the federal interest involved*, the Constitution simply does not give Congress the authority to require the States to regulate." (emphasis added)).

objects that Congress could regulate; as a surrogate for those substantive limits, the Court in its pre-*Katz* jurisprudence interpreted the Constitution to protect federalism by limiting the means that Congress may use to regulate.

IV. *KATZ*: A NARROW EXCEPTION OR NEW PARADIGM?

Katz squarely presented the Supreme Court with the originalist's dilemma. Historical evidence strongly suggests that the Constitution, as it was originally understood, would have permitted the action in *Katz* against the petitioners, notwithstanding their assertion of sovereign immunity. But the Constitution as it was originally understood also placed significant, judicially enforceable limits on the power of Congress to interfere with state sovereign immunity—through limitations on the scope of the commerce power.

Four members of the *Katz* Court resolve the dilemma in favor of protecting the original constitutional command of federalism by voting to uphold the sovereign immunity of the petitioners notwithstanding the historical evidence.²¹⁴ The majority, by contrast, resolves the dilemma by viewing the Bankruptcy Clause in isolation.²¹⁵ Because it was originally understood to permit Congress to subject states to private suits without their consent, it permits Congress to do so today—even though the Constitution as it was originally understood denied to Congress many of the other powers that it currently enjoys.

Although the *Katz* majority and dissent reflect different approaches to state sovereign immunity, the holding of *Katz* itself does not represent a new paradigm for future sovereign immunity cases so much as an application of the framework that the Court articulated in *Seminole Tribe*²¹⁶ and *Alden v. Maine*.²¹⁷

Seminole Tribe reaffirmed the longstanding principle that states were, at the time of the Founding, and are today, immune from private suits in federal courts.²¹⁸ *Alden* recognized that at the time of the Founding states possessed a well established right of a sovereign to assert immunity from suit in the sovereign's own courts.²¹⁹

In *Alden* the Court made clear that the right of a state to assert sovereign immunity is the rule, and congressional power to subject states to suit without their consent is the exception. According to *Al-*

214 *Katz*, 126 S. Ct. at 1014 (Thomas, J., dissenting).

215 *Id.* at 1004 (majority opinion).

216 517 U.S. 44.

217 527 U.S. 706.

218 517 U.S. at 47.

219 527 U.S. at 741.

den, the burden is on Congress, who “may subject the States to private suits . . . only if there is ‘compelling evidence’ that the States were required to surrender the power to Congress pursuant to the constitutional design.”²²⁰

The *Alden* Court found no compelling evidence that the states were required to surrender their power to assert sovereign immunity with respect to private suits in their own courts.²²¹ In contrast, “compelling evidence” exists that the states were required, as part of the constitutional design, to surrender the power to assert a sovereign immunity defense with respect to orders ancillary to in rem proceedings that Congress authorized pursuant to its Article I bankruptcy power.

The rhetoric that *Katz* rejected as reflecting an “erroneous” assumption was that which presumed that meeting this standard was a wholly insurmountable hurdle.²²² At most, the holding of *Katz* transforms what was an absolute rule into a very strong presumption. This presumption should continue to be effective to give life to the original, constitutional command of federalism by restraining Congress’s power to subject states to private suit in all cases where the original understanding of the Constitution is not unmistakably clear.

In *Alden* the Court examined a significant amount of evidence suggesting that states did surrender a portion of their sovereign immunity. Among other evidence, the Court examined the ratification debates, which reveal that many of the Framers believed that a surrender had occurred.²²³ The Court also noted that in 1793 it had held in *Chisholm* that states could not assert sovereign immunity from suit, and that the Eleventh Amendment did not, by its terms at least, resolve whether states retained sovereign immunity in state courts.²²⁴ The *Alden* Court did not regard this as even “persuasive evidence that the founding generation regarded the States’ sovereign immunity as defeasible by federal statute,”²²⁵ much less *compelling* evidence.

Like *Katz*, *Alden* also evaluated early congressional practice. Unlike in *Katz*, the *Alden* Court found no evidence of early statutes subjecting states to suit in their own courts. *Alden* understood the Founders’ silence to indicate that the Founders did not understand the Constitution to alter the right of states to assert sovereign immunity.²²⁶

220 *Id.* at 731.

221 *See id.* at 754.

222 *Cent. Va. Cmty. Coll. v. Katz*, 126 S. Ct 990, 996 (2006).

223 527 U.S. at 733–34.

224 *Id.* at 734 (citing *Chisholm v. Georgia*, 2 U.S. (2 Dall.) 419, 449 (1793)).

225 *Id.* at 733.

226 *Id.* at 741.

Alden and *Katz* are instructive as to what quantum of evidence is sufficiently “compelling” to overcome the strong presumption that states may assert sovereign immunity notwithstanding congressional action. The substantial amount of evidence examined in *Alden* suggests that for evidence to be “compelling” it must approach the equivalent of at least one act passed by an early Congress that directly interfered with state sovereign immunity, and that raised no constitutional doubt.

CONCLUSION

The habeas corpus provision of the Bankruptcy Act of 1800 suggests that state sovereign immunity was an attribute of sovereignty that was originally protected by the text of the Constitution—through enumeration and reservation. Because of the Court’s expansion of the federal commerce power, enumeration and reservation today protects virtually nothing. The Court’s recent jurisprudence recognizing that an otherwise valid exercise of Article I power is constitutionally improper because it interferes with state sovereign immunity employs a nontextual limitation on congressional means as a surrogate for the original textual mechanism for protecting federalism. Through this limitation the Court breathes life into the original constitutional command that states in our republic remain autonomous, sovereign entities, rather than subordinate components of the federal government.

Katz reveals a limit on this nontextual mechanism, requiring it to yield where historical practice makes Congress’s power to subject unconsenting states to private suits unmistakably clear. The Court’s approach perfectly preserves neither the original understanding of state sovereignty nor congressional power, but a perfect reconciliation of the two is impossible in light of Congress’s judicially expanded commerce power. Because the Court’s modern Commerce Clause jurisprudence eviscerates the constitutional mechanism for striking the balance between congressional power and state autonomy, the Court is correct to endeavor to give meaning to the original constitutional command of federalism through other mechanisms, even if they are imperfect.